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APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-286

IOWA BEEF PACKERS, INC., *Petitioner*

v.

EDWARD D. THOMPSON, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IOWA

PETITION FOR CERTIORARI FILED JUNE 16, 1971
CERTIORARI GRANTED OCTOBER 12, 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-286

IOWA BEEF PACKERS, INC., *Petitioner*

v.

EDWARD D. THOMPSON, ET AL., *Respondents*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF IOWA

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IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

(This is one of 14 Petitions, all identical except for amounts claimed. The *Caption in Full*, after Consolidation of the cases, is shown at A.7 herein and in all judgments and orders.)

JAMES R. MORGAN, *Plaintiff*,

v.

IOWA BEEF PACKERS, INC., *Defendant*.

Petition at Law

Plaintiff for cause of action states:

1. That Plaintiff is a resident of Crawford County, State of Iowa.

2. Plaintiff brings this action to recover from Defendant unpaid wages and overtime compensation in the amount of $1,487.16, and an additional equal amount of liquidated damage and a reasonable attorney fee, pursuant to Section 16(b) of the Fair Labor Standards Act of 1938 as amended (U.S.C. Title 29, Sections 201-219), hereinafter referred to as the Act.

3. Jurisdiction is conferred on the Court by Section 16(b) of the Act (U.S.C. Title 29, Section 216b).

4. At all times, hereinafter mentioned, the Defendant was and is a Corporation organized and existing under and by virtue of the laws of the State of Iowa, and at all times, hereinafter mentioned, was engaged at Denison, Crawford County, Iowa, and elsewhere in the operation of packing plants where domestic animals are slaughtered, butchered, dressed, and prepared for market and meat products, and meat by-products are manufactured and produced for interstate commerce within the meaning of the Act. Substantially all of the goods produced by the Defendant, during

the times herein mentioned, have been sold, offered for transportation, transported, shipped and delivered in interstate commerce with knowledge that shipment, delivery or sale thereof in interstate commerce was intended from the Defendant's places of business at Denison, Iowa, and elsewhere, to various points outside the State of Iowa. The volume of such production, sale, shipment and delivery was and is not less than $1,000,000.00 annual gross volume.

6. That during the work weeks beginning at a time not earlier than two years before the filing of this complaint and ending on the 28th day of April, 1967, the Defendant employed the Plaintiff in the maintenance department at the Defendant's plant in Denison, Iowa. That the services performed by the Plaintiff were necessary and an integral part of and directly essential to the Defendant's business and to the production of the commodity shipped by the Defendant in interstate commerce.

7. That the duties performed by the Plaintiff consisted, among other things, of maintaining and repairing plant equipment and machinery so as to keep said equipment and machinery in good running order, and in order to perform these duties to the satisfaction of the Defendant, the Plaintiff was required to be on call during his alleged thirty minute meal period of each work day. That the Plaintiff being on call during his alleged meal time was and is a necessary and an integral part of the Defendant's operation, and required the Plaintiff to be on duty an additional one half hour each day in addition to the regular forty hour week, but the Defendant refuses to pay Plaintiff for this time. That the Plaintiff should be compensated for this time at the rate of one and one-half times his regular hourly rate.

8. That during such time Plaintiff worked forty hours or more each week, not including said daily thirty minutes period and said thirty minute daily period is additional time worked over forty hours a week, and Defendant has

failed and refused to compensate Plaintiff for said time worked at rates not less than one and one-half times the regular rates at which he was employed, as required by Section 7 of the Act. Plaintiff was accordingly underpaid the sum of $2.43 for each thirty minute period above referred to or the sum of $1,487.16 for the said period.

9. That it has been necessary for the Plaintiff to engage, and he has engaged, the services of attorneys to file and prosecute this action. Affidavit for attorney fees is hereto attached marked Exhibit "A".

WHEREFORE, Plaintiff prays that judgment be awarded him in the amount of $1,487.16 unpaid wages and overtime compensation, and for an additional amount as liquidated damages, together with costs; and that the Court allow Plaintiff a reasonable attorney's fee to be paid by the Defendant.

/s/ JAMES R. MORGAN

(Formal verification omitted in printing)

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

(This is one of 14 Answers, all identical. The *Caption in Full* after Consolidation of the 14 cases, is shown at A.7 herein and in all judgments and orders.)

Answer

(Caption omitted in printing)

COMES Now the Defendant and for Answer to Plaintiff's Petition states:

1. Defendant does not controvert the allegations of Paragraph 1.

2. Defendant admits that the action is brought for the purposes stated in Paragraph 2 of the Petition but denies that any amount is due from the Defendant to the Plaintiff.

3. Defendant admits the allegations of Paragraph 3, subject, however; to the affirmative defense alleged in Paragraph 10 of this Answer.

4. Defendant does not controvert the allegations of Paragraph 4.

5. There is no Paragraph 5 in the Petition and accordingly no Answer can be given.

6. Defendant does not controvert the allegations of Paragraph 6.

7. Defendant admits that the duties performed by the Plaintiff consisted, among other things, of maintaining and repairing plant equipment and machinery so as to keep said equipment and machinery in good order, but denies that Plaintiff was required to be on call during his thirty (30) minute meal period of each work day in order to perform the duties to the satisfaction of the Defendant, or for any other reason. Defendant states affirmatively that Plaintiff was not required to be on call during his thirty (30) minutes meal period and that Plaintiff on every work day was allowed thirty (30) minutes to eat his meal. Defendant denies all the remaining allegations of Paragraph 7.

8. Defendant denies that during the time involved in the Petition the Plaintiff worked forty (40) hours or more during every week, but admits that such would be true as to most of the weeks. Defendant admits that it has failed and refused to compensate Plaintiff for the time claimed in the Petition and that if such pay were due, in most weeks it would be at rates not less than one and one-half times the regular rate at which he was employed, as required by Section 7 of the Act but expressly denies that any such sums are due to the Plaintiff. Defendant denies the remaining allegations of Paragraph 8.

9. Defendant denies that it has been necessary for the Plaintiff to engage the services of attorneys to file and

prosecute this action, but admits that he has engaged such services and admits the Affidavit for Attorney Fees was attached to the Petition and marked Exhibit "A".

10. Plaintiff states affirmatively that it is now admitted upon this record that Plaintiff's employment at Defendant's plant in Denison was covered by Collective Bargaining Agreements at all times material herein between Associated Employees Organization and Defendant and that Exhibit "A" attached to the Request For Admissions is a true and correct copy of the Collective Bargaining Agreement for the time specified therein and that Plaintiff did not take any of the Steps permitted under the Grievance Procedures of the Collective Bargaining Agreements. Accordingly Plaintiff having failed to exhaust such Grievance Procedures is not entitled to bring this action and this action should be dismissed for such failure.

WHEREFORE Defendant prays that Plaintiff's action be dismissed at Plaintiff's costs.

P. L. NYMANN
P.O. Box 248
Dakota City, Nebraska 68731
Attorney for Defendant

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

(This is one of 14 Motions, all identical. Caption omitted in printing.)

Motion for Separate Adjudication of Law Points

COMES Now the Defendant and moves the Court to separately hear and determine the point of law raised in Paragraph 10 of its Answer, as provided by Rule of Civil Procedure 105, because said point of law raises a legal issue directed to substantially the whole if not the whole of the

Plaintiff's alleged cause of action and adjudication favorably to the Defendant will dispose of substantially all, if not all, of the case.

P. L. NYMANN
P.O. Box 248
Dakota City, Nebraska 68731
Attorney for Defendant

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

Ruling of Trial Court Denying Petitioner's Motion to Dismiss

No. 21894—Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Plaintiffs*,

v.

IOWA BEEF PACKERS, INC., *Defendant.*

Before the HONORABLE A. J. BRAGINTON, Judge.

Ruling filed March 5, 1968 (in each of 14 cases).

On Motion for Separate Adjudication of Law Points (motion filed September 19, 1967).

The defendant is asking the court to determine the points of law raised in paragraph 10 of it's answer. (sic)

In this action the plaintiff is seeking compensation for 30 minute meal periods for which he has not been compensated. Plaintiff asserts that in the performance of his

duties in his employment by the defendant he was required to be subject to call during said meal periods, and that by reason of his being subject to call, said period of time was and is a necessary and integral part of defendant's operation and therefore such periods are compensable under the act. Defendant admits plaintiff was not paid for such periods, and asserts that plaintiff was not required to be subject to call during said periods and such periods of time are not compensable.

If upon trial it was found that under the act such 30 minute meal periods are compensable, the fact that his employment in defendant's plant was subject to a collective bargaining agreement or that plaintiff did not proceed as provided under the grievance procedures of such agreement and thus failed to exercise the grievance provisions of the agreement, such does not preclude recovery by the plaintiff for wages due for work which is compensable under the act, and it follows that defendant would not be entitled to have plaintiff's case dismissed as alleged in paragraph 10 of it's answer. (sic)

This court determines that the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act of 1938 as amended, cannot be restricted, abrogated or nullified by any agreement entered into by an employee and employer, or by employees with their employer, or by and through a collective bargaining agreement entered into with the employer and the representative of the employees.

By the Court: (signed) A. J. Braginton,
Judge.

Final Judgment and Decree of Trial Court

IN THE DISTRICT COURT OF IOWA
IN AND FOR CRAWFORD COUNTY

No. 21894—Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

EDWARD D. THOMPSON (and 13 others), *Plaintiffs*,

v.

IOWA BEEF PACKERS, INC., *Defendant*.

Before the Honorable A. J. BRAGINTON, Judge.

On October 20, 1969, there was filed

FINAL JUDGMENT AND DECREE

On the 5th day of February, 1969, this court entered a judgment determining that the Plaintiffs are entitled to recover for their one-half hour lunch period at the applicable wage scale or rate as such maintenance employees of the Plaintiff for such time as they were so employed by the Defendant company during the two-year period immediately preceding the commencement of their respective actions.

On July 8, 1969, as the result of a motion to amend and enlarge the findings and to modify the judgment, this court directed the parties to submit the hours of employment and rate of pay pertaining to each Plaintiff under the judgment entered herein on February 5, 1969, and the court therein determined that none of the Plaintiffs have shown themselves to be entitled to liquidated damages.

On the 15th day of September, 1969, this court by order directed that a hearing be held on this date relative to the matter of the attorney fees, and on this date the parties have filed a stipulation in which the basic compensation of

each of the Plaintiffs was fixed for the purposes of the suit without waiving any right of appeal. At said hearing the court approved certain attorney fees in respect to each of the cases.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiffs in each of their respective cases have and recover from the Defendant the amounts hereinbelow set forth after their names, and in each of the respective cases the Plaintiff shall have and recover the total judgment as shown therein, with interest at the legal rate from and after February 5, 1969, together with the costs in each action to be entered by the clerk.

Name	Basic Compensation	Attorney Fees	Total Judgment
Edward D. Thompson	$1,261.33	$200.00	$1,461.33
Jay Nollen	1,288.87	200.00	1,488.87
Kenneth A. Harder	244.82	150.00	394.82
Donald J. Sporrer	1,338.44	200.00	1,538.44
Lawrence W. Kennedy	1,338.44	200.00	1,538.44
Albert Weaver	1,228.87	200.00	1,488.87
James R. Morgan	1,338.44	200.00	1,538.44
Val Jean Johnannsen	1,338.44	200.00	1,538.44
Raymond James Johnson	1,338.44	200.00	1,538.44
Luverne M. Hoffman	1,338.44	200.00	1,538.44
Carol W. Vennink	1,261.33	200.00	1,461.33
Ben J. Lackman	1,261.33	200.00	1,461.33
Larry James Larrison	658.48	150.00	808.48
Lawrence J. Kabela	274.12	150.00	424.12

The clerk is hereby ordered and directed to enter judgment in favor of the Plaintiff in his respective action against the Defendant for the basic compensation and attorney fees as above set out, together with the costs in said action, said judgment to bear interest at the legal rate from February 5, 1969.

By the Court: (signed) A. J. BRAGINTON,
Judge.

Order of Supreme Court of Iowa to Consolidate 14 Cases

IN THE SUPREME COURT OF IOWA

No. 21894—Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Plaintiffs*,

v.

IOWA BEEF PACKERS, INC., *Defendant*.

May 20, 1970.

ORDER OF CONSOLIDATION

And now on this 20th day of May, 1970, there having been presented to the undersigned, one of the Justices of the Supreme Court of Iowa, a joint Motion by all parties for the consolidation of these cases on appeal, with a waiver of notice of hearing by all parties;

And it appearing that for good cause shown the cases should be consolidated for purposes of appeal.

For the Court: (signed) MAURICE E. RAWLINGS
Justice of Supreme Court of Iowa

Order by Supreme Court of Iowa, Granting Stay

IN THE SUPREME COURT OF IOWA

Filed April 29, 1971

Order Granting Stay

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54323

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Appellees*,

v.

IOWA BEEF PACKERS, *Appellant*.

Now on this 29th day of April, 1971, defendant's application to stay execution of procedendo herein, having come on for hearing pursuant to prior order, defendant-applicant having appeared by Attorney Louis S. Goldberg, of Sioux City, Iowa, plaintiff having appeared by Attorneys E. A. Raun and Michael Mundt, of Denison, Iowa, arguments were duly pre-presented, the matter submitted and taken under advisement.

IT IS NOW ORDERED, ADJUDGED AND DECREED that execution of procedendo herein be and is hereby stayed for seventy (70) days from date hereof to allow defendant-applicant to petition the Supreme Court of the United States of America for review, and

IT IS FURTHER ORDERED in the event such petition be not filed within the aforesaid time, procedendo shall issue upon expiration of said seventy (70) day period, and

IT IS FURTHER ORDERED, in event such petition be so filed within the time above prescribed, then the aforesaid stay shall remain in effect until the Supreme Court of the United States of America shall have finally acted upon such petition for review, and (1) if denied then procedendo shall thereupon issue, (2) if granted said stay shall be and remain in effect until the matter shall have been finally determined by the Supreme Court of the United States of America, and

IT IS FURTHER ORDERED, for good cause shown, bond is hereby waived.

DONE this 29th day of April, 1971, in Sioux City, Iowa.

(signed) MAURICE E. RAWLINGS
Justice, Supreme Court of Iowa.

Majority Opinion by Supreme Court of Iowa

IN THE SUPREME COURT OF IOWA

Filed April 9, 1971

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EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNICK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Appellees*,

v.

IOWA BEEF PACKERS, *Appellant*.

Appeal from Crawford District Court—A. J. BRAGINTON, Judge.

Appeal from judgment for plaintiffs for overtime compensation under Fair Labor Standards Act.—Affirmed.

P. L. NYMANN, of Dakota City, Nebraska, for appellant.

RAUN & FRANCK, of Denison, for appellees.

UHLENHOPP, J.

The main question presented in this appeal is whether workmen are required to attempt contract arbitration before they can sue for overtime compensation under the Fair Labor Standards Act (FLSA), 29 U.S.C.A. §§ 201-219.

The case was tried by ordinary proceedings without a jury. From the evidence the trial court could reasonably find that plaintiffs were maintenance men in defendant's plant near Denison, Iowa, during the period in question from April 28, 1965, to April 28, 1967. The plant was fairly new. During the first years many breakdowns occurred, necessitating much work by the maintenance men to avoid costly "down time." A bell was sounded when the men were needed. After the plant had been constructed, a lunch room for the maintenance men was added just off the kill floor so they could answer the bell more readily.

Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period. The evidence clearly indicates, however, that until February of 1966, the lunch period existed more in name than in fact. On numerous occasions the men were obliged to answer bells during lunch. When they tried to eat lunch later, they would frequently be interrupted again by the bell.

Eventually one of the maintenance men undertook grievance procedure because he was not getting his lunch period. This precipitated a meeting by defendant's industrial relations officer with the maintenance men in February, 1966. That officer instructed the men that they were free to leave the premises during their lunch period.

The instructions appear to have been honored by the employer more in the breach than in observance. Breakdowns continued to occur, the production people needed immediate

help from the maintenance men, the bell continued to be rung during lunch periods, and the maintenance men were expected to, and did, respond. The situation did not in fact change from what it had been. A procedure for two shifts of maintenance men was attempted, but did not prove efficacious.

On April 28, 1967, plaintiffs commenced this action for compensation for their lunch periods during the preceding two years. Shortly thereafter, the industrial relations officer dealt with the situation in a letter which was sent to each maintenance man. That letter, however, related to the future.

The collective bargaining contract between the union and defendant provided grievance procedure including arbitration. The trial court overruled defendant's contention that the men had to arbitrate before they could sue, held on the facts that the maintenance men were actually on call during their lunch period for the two years in question, and granted the men conpensation accordingly. Defendant appeals.

Defendant makes three contentions here. First, the workmen were not on call during lunch periods after the instructions were given in February 1966 to the effect they could leave the premises during such periods. Second, one of the workmen who said he always got his 30 minutes for lunch at some time during the day could not in any event claim he had not gotten his lunch periods. Third, the men had to attempt arbitration before they could sue.

I. Defendant's first two contentions are primarily factual and may be considered together. The trial court's findings of fact, if supported by substantial evidence, bind us. *Rule* 344(f)(1), *Rules of Civil Procedure.*

The legal principle regarding compensable time under FLSA for being "on call" was announced in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118.

The decisions lay stress on whether the employees are actually free to pursue their own interests during their lunch period. If, in fact, the employer retains a hold on the employees for services when needed during a lunch period, so that the employees are not actually at liberty, the period constitutes compensable time. *Glen L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981 (8th Cir.); *F. W. Stock & Sons* v. *Thompson*, 194 F. 2d 493 (6th Cir.); *Wirtz* v. *Minton Rendering Co.*, 54 Lab. Cas. Para. 31,876 (U.S. Dist. Ct. N.D. Tex.); *Hofler* v. *Spearin, Preston & Burrows*, 51 Misc. 2d 758, 273 N.Y. 2d 873.

Here the men had 30 minutes for lunch. It hardly seems reasonable that the parties contemplated the men would drive from the plant to their homes or other places, eat, drive back, and be back on time. In fact, a separate lunch building was provided for them on the premises, where they would hear the bell. On numerous occasions, both before and after February 1966, they were actually called during the lunch period. On cross-examination, defendant's witness LaFleur admitted with commendable candor, "If it was a serious breakdown and the men were present, were readily accessible, they were asked to help with the breakdown, yes; if they were on their lunch break. If they were called on their lunch break and given a lunch break later, the same thing could happen. They would have to answer the bell then, too." Defendant's witness Walker made somewhat similar admissions. Defendant's witness O'Brien, telling about frequent breakdowns before new equipment was installed in recent times, stated in a letter that "The maintenance men will remember the thousands of times they had to run because the boilers have dropped out"; "Many will remember the loss of steam that caused hours of dying time and lost profits"; "The maintenance men will remember the long hard hours of work put in on the sump under the coolers."

As to the period subsequent to February 1966, the trial court found the situation was no different than before—the

men were actually on call. We do not say we would reach the same finding on the evidence, but substantial evidence supports the trial court's finding.

As to the contention that one workman actually got his 30 minutes for lunch each day, we think defendant misapprehends the rationale of *Armour & Co.* v. *Wantock.* The question is not whether a workman actually gets his 30 minutes without interruption. The question is whether he is on call during that period, or free to pursue his own interests. He may get his lunch times without interruption every day for a week or at various times throughout a given day. But if those times in fact belong to the employer, if the employee is not free but is actually subject to call during those times, then the times are compensable. The trial court could reasonably find that such was the situation here.

We cannot sustain defendant's challenges to the findings of fact.

II. What about defendant's contention that plaintiffs had to attempt arbitration before they could sue? The contract under which plaintiffs worked contained a provision for four-step grievance procedure culminating in binding arbitration. Plaintiffs did not pursue that course but brought their complaint directly to court. Did they have the choice of arbitration or litigation, or where they obliged to try arbitration first?

Defendant is engaged in interstate commerce, and substantive federal labor law applies. *Humphrey* v. *Moore,* 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370. The present controversy is undoubtedly arbitrable. *Donahue* v. *Susquehanna Collieries Co.,* 138 F.2d 3 (3rd Cir.). Agreements to arbitrate may ordinarily be specifically enforced. *United Steelworkers of America* v. *Warrior Gulf Navigation Co.,* 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409.

As a general rule, federal labor policy requires that employees seeking to assert grievances must initially attempt

to use contract grievance procedure including arbitration. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed 2d 972; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580. These decisions are founded on § 301(a) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S. C.A. § 185(a).

In accordance with this general rule, federal courts of appeal have held that employees must attempt to arbitrate FLSA claims before they can come to court. *Donahue* v. *Susquehanna Collieries Co., supra; Watkins* v. *Hudson Coal Co.*, 151 F.2d 311 (3rd Cir.); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir.); *Beckley* v. *Teyssier*, 332 F.2d 495 (9th Cir.). Some federal and state trial courts had previously held to the contrary. Annot., 24 A.L.R.2d 752.

The United States Supreme Court does not appear to have spoken on the problem as to FLSA claims, but it recently decided *U.S. Bulk Carriers* v. *Arguelles*, 91 S. Ct. 409, 27 L. Ed 2d 456 (U.S.). A federal statute which antedates the Labor Management Relations Act, requires a master or owner of a vessel to pay seamen promptly, failing which the seamen are entitled to recover "two days pay for each and every day during which payment is delayed . . . which sum shall be recoverable as wages in any claim made before the Court. . . ." 46 U.S.C.A. § 596. In *Arguelles*, a majority of the Court thought that statute indicated Congressional intent to permit a seaman to sue without first attempting arbitration, which prevailed over Congressional intent favoring prior arbitration generally.

Does the Fair Labor Standards Act indicate similar Congressional intent, leading to the belief that the United States Supreme Court will apply *Arguelles* to FLSA cases? We are inclined to think so, although the question is close.

The Fair Labor Standards Act too antedates the Labor Management Relations Act. It also contains provisions for court proceedings and penalties, indeed, considerably more

elaborate provisions than the statute involved in *Arguelles*. Under FLSA, an employer is liable to an employee for overtime pay and "an additional equal amount as liquidated damages." Action to recover such amounts "may be maintained in any court of competent jurisdiction." An employee may bring a class action with consent of the class—for himself "and other employees similarly situated." A plaintiff who is successful is entitled to "a reasonable attorney fee to be paid by the defendant, and costs of the action." The Secretary of Labor is authorized to supervise payment of unpaid overtime compensation owing an employee. The Secretary may sue to recover such overtime for an employee when so requested by him. All of these rights are contained in § 16 of FLSA, 29 U.S.C.A. § 216. In addition, the federal district courts have broad jurisdiction to enjoin violations of FLSA requirements. § 17, 29 U.S.C.A. § 217.

As stated, the federal decisions generally requiring arbitration are founded mainly on § 301(a) of the Labor Management Relations Act, giving federal courts jurisdiction to enforce collective bargaining contracts—including arbitration clauses of such contracts. We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the courts in FLSA cases. We are the more persuaded of that view by the broad Congressional policy expressed in § 2 of FLSA, 29 U.S.C.A. § 202. There the objectives of the act are set forth, and those objectives encompass more than simply wage relief for employees; they include broad economic considerations—improvement in commerce among the states. The remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of those broader objectives. We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the

seaman's act involved in *Arguelles*, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act.

Affirmed.

BECKER, LEGRAND and REES, JJ. concur,
MASON, J. concurs in result,
STUART, J. and MOORE, C.J. dissent,
RAWLINGS, J. takes no part.

Dissenting Opinion by Supreme Court of Iowa

STUART, J., dissenting.

I respectfully dissent from division II and the result. As a consequence, I would not reach the merits of the case. Federal law applies. My study of the federal cases leads me to conclude that plaintiffs were required to exhaust the grievance procedures, including arbitration, contained in the collective bargaining agreement covering the plant where they were employed before they could institute this action for overtime pay under the Fair Labor Standards Act, 29 U.S.C.A. § 201-219 (FLSA).

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available." *Republic Steel Corporation* v. *Maddox*, (1965), 379 U.S. 650, 652, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583.

Under federal law, agreements to arbitrate may be specifically enforced. *Local Union No. 721* v. *Needham Packing Co.* (1963), 254 Iowa 882, 885, 119 N.W. 2d 141, 142; *United Steelworkers of America* v. *American Mfg. Co.* (1960), 363

U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed 2d 1409; *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation* (1960), 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 1424.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *United Steelworkrs of America* v. *Warrior & Gulf Navigation Co., supra,* 4 L. Ed. 2d at 1417-1418; quoted in *Local Union No. 721* v. *Needham Packing Co.* (1967), 160 Iowa 908, 912, 151 N.W. 2d 540, 543.

Plaintiffs do not quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement. The narrow issue is whether a claim for overtime wages under the FLSA is an exception to these general rules.

Although the United States Supreme Court has not decided this issue, the federal circuit courts that have considered it hold grievance procedures must be exhausted before these statutory rights can be enforced in the federal courts. *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F.2d 945; *Evans* v. *Hudson Coal Co.* (3rd Cir. 1948), 14 CCH Lab. Cas. Par. 64,318, 165 F.2d 970; *Watkins* v. *Hudson Coal Co.* (3rd Cir. 1945) 10 CCH Lab. Cas. Par. 62,761, 151 F.2d 311; *Donahue* v. *Susquehanna Colleries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F.2d 3; Anno. 24 A.L.R. 2d 754, 764-766, 779-780.

Earlier New York and federal district court cases to the contrary have not been followed. *Bailey* v. *Karolyna Co.* (1943, DC NY), 50 F. Supp. 142, CCH Lab. Cas. Par. 61,550; *Voutrey* v. *General Baking Co.* (1941, DC PA), 39 F. Supp.

974; *Garrity* v. *Bagold Corp.* (1943), 180 Misc. 120, 42 N.Y.S. 2d 257, mod. on other grounds 257 App. Div. 353, 46 N.Y.S. 2d 637; *McClintock* v. *Garment Center Capitol, Inc.* (1943), 112 NYJL 1022, CCH Lab. Cas. Par. 61,814; *Re City Bank Farmers Trust Co.* (1943), 179 Misc. 770, 39 N.Y.S. 2d 842.

The FLSA does not provide that such rights *shall* be enforced in the courts. If it did, a collective bargaining agreement providing for arbitration would be ineffective. In the absence of a specific prohibition, the parties may agree between themselves how these rights shall be enforced.

> "Is there anything about the Fair Labor Standards Act which removes claims under its terms from the arbitration clause? We may concede that Congress could have done so had it wished. It could have provided that any claim under the act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language. * * *
>
> "* * * (W)e see nothing in the wording of the Fair Labor Standards Act which precludes arbitration of claims under it. No doubt it creates rights which make a basis of a claim by an employee against an employer who violates it. So does any contract. A claim under the act and a claim based on a contract—each is based on a legal right which claimant asserts against someone else. Arbitration is one way by which such right can be enforced. There is no reason why it cannot be availed of to secure rights under the Fair Labor Standards Act just as well as a right arising out of a contract or imposed by law as a consequence of a tort." *Donahue* v. *Susquehanna Collieries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F. 2nd 3.

In *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F. 2d 945, plaintiffs brought an action

in the federal court to recover overtime pay for traveling to and from work under the FLSA. The proceedings were stayed by the district court. The circuit court affirmed saying:

> "The appellants contend that since they seek recovery under the provisions of the Fair Labor Standards Act and not under the Collective Bargaining Agreement, the district court erred in staying the civil action pending arbitration under the Collective Bargaining Agreement. Appellants support such contention by arguing that whether the time spent by them in traveling to and from the barracks to the job site constitutes hours worked under the Fair Labor Standards Act is a legal question which must be determined by the courts without reference to the provisions of the Collective Bargaining Agreement, and presents a question which cannot be determined by an arbitrator. Appellants cite no provision of the Fair Labor Standards Act which precludes arbitration of claims arising under it. We have found none. • • •
>
> "It is clear to us that the claims of appellants are ones growing out of the relation of employer and employee and necessarily involve the application and interpretation of the contract provisions above quoted, and therefore fall squarely within Article V of the Collective Bargaining Agreement. See *Evans* v. *Hudson Coal Co.*, (14 LC 64,318) 165 F. 2d 970 (3rd Cir. 1948). To sustain appellants' contention would be to emasculate the arbitration provisions contained in the Collective Bargaining Agreement."

The United States Supreme Court has approvingly referred to this line of cases. "The reports of both Houses on that Act (Federal Arbitration Act) stress the need for avoiding the delay and expense of litigation, and practice under its terms raises hope for its usefulness both in controversies *based on statutes* or on standards otherwise

created." *Wilko* v. *Swan* (1953), 346 U.S. 427, 431-432, 94 S. Ct. 182, 98 L. Ed. 168, 174. (Emphasis added.)

It is clear to me that if plaintiffs had brought this action in federal court subject to the Federal Arbitration Act, 29 USCA § 3, proceedings would have been stayed pending arbitration. Here, defendant asks for dismissal of the suit because plaintiffs failed to exhaust the grievance procedures of the collective bargaining agreement.

Is the obligation to exhaust the internal remedies in a collective bargaining agreement modified when a judgment is sought on jurisdictional grounds in a state court? I have found no United States Supreme Court decisions on this question involving statutory rights under the FLSA, but an action in a state court by an individual for severance pay claimed to be due under the terms of a collective bargaining agreement was dismissed for failure to exhaust grievance procedures. *Republic Steel Corp.* v. *Maddox* (1965), 379 U.S. 650, 653, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583-584.

In his opinion, Mr. Justice Harlan sets forth the reasons for the strong federal policy favoring arbitration as follows:

> "But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. * * * Union interest in prosecuting employees grivances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said in the nor-

mal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.' *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95, 103. 7 L. Ed. 2d 593, 599, 82 S. Ct. 571."

These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision. There is less reason to permit a lawsuit here than in *Maddox* where the claim was for severance pay, the plant was closed and no one held the position of foreman any longer with whom to initiate grievance procedures.

Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on the contract.

I agree with the majority that *U.S. Bulk Carriers, Inc.* v. *Arguelles* (decided by the United States Supreme Court January 13, 1971) offers guidance on this question, but it guides me to the opposite result.

There a seaman brought an action in the federal district court for wages and a penalty alleged to be due under the provisions of 46 U.S.C. § 596, which permits seamen to

sue for wages in federal courts. The majority opinion (five justices) is based on statutory construction and reaches the conclusion that Congress in section 301(a) of the Labor Management Relations Act of 1947, 29 U.S. § 185(a) did not intend to deprive seamen of a remedy they had had since 1790. The opinion held plaintiff could either sue in the federal courts or invoke the grievance procedures of the collective bargaining agreement.

Justice Harlan, one of the majority, concurred specially stating that the cases of *Smith* v. *Evening News Asso.* (1962), 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246; *Republic Steel Corp.* v. *Maddox, supra;* and *Carey* v. *Westinghouse Corp.* (1964), 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320, "evince the crucial role of the federal judiciary in forging the proper relationships among available arbitral, administrative, and judicial forums for vindicating contractual and statutory rights of employers, unions, and employees. *In light of these cases, I cannot infer, from the mere provision by Congress of a federal judicial forum for enforcement of the wage claims of a subclass of workers' wages, that this Court is foreclosed from requiring arbitration under the collective-bargaining contract.*" (Emphasis added)

He makes the distinction between an individual's claim for wages based "simply on a contract" (*Maddox*) and a claim for wages growing out of a federal statute (*Arguelles* and the instant case) and states:

> "Where, however, the § 301 dispute implicates federal statutory rights, it is incumbent upon this Court to fashion the relationships among forums according to an analysis of the policies underpinning both § 301 and the federal statute the employee invokes, rather than simply transposing *ipso facto* the Court's labor arbitration jurisprudence."

He concluded:

> "And the difficulties of analyzing the respective boundaries of the contractual right and the statutory

right forbode ill for the efficient resolution of disputes implicating both the contract right and the federal statutory right. But the matter is not one to be decided abstractly; it may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests.

"However, this is not such a statute, because the *very essence of the legislative policy at stake here is ensuring promptness in the payment of wages.* I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. § 596 and § 301 of the Labor-Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. § 596" (Emphasis added.)

Justice White joined by Brennan, Stewart and Marshall, dissented stating: "In *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448 (1957), it was held that federal courts have jurisdiction to specifically enforce the arbitration provisions of the collective-bargaining agreement. And it has been clear at least since *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650 (1965), that absent extraordinary circumstances not alleged here, contractual grievance procedures must be exhausted before suit can be brought."

On the distinction between contract and statutory rights he said: "nor until now has there been any principle which requires contract rights to be resolved internally but directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues which are cognizable under the arbitration clause. In fact, this Court and lower federal courts have endorsed the suitability of arbitration

to resolve federally created rights. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court expressed 'hope for (arbitration's) usefulness • • • in controversies based on statutes • • •' 346 U.S. at 432. And circuit courts of appeal both before and after passage of § 301 have required that FLSA employee's claims for liquidated damages under 29 U.S.C. § 216(b) for failure to pay overtime wages be referred to contractual grievance procedures before being presented to the court."

In view of the federal cases, the position of the minority and Justice Harlan's concurring opinion in *Arguelles* and his generally favorable view toward arbitration, I believe the federal law to be that congressional policies are best reconciled by holding that actions for wages under the FLSA are under the general rule that contract grievance procedures must be exhausted before an action can be brought in the courts. There is nothing in the majority opinion to indicate disagreement with this conclusion. The peculiar facts which persuaded the court Congress did not intend to take away a traditional remedy in *Arguelles* are not present in this case.

I would dismiss the action as having been brought prematurely.

MOORE, C. J., joins in this dissent.

Some Sections of the Collective Bargaining Agreement

AGREEMENT BETWEEN IOWA BEEF PACKERS AND ASSOCIATED EMPLOYEES ORGANIZATION

ARTICLE III—PURPOSE OF AGREEMENT

SECTION 1: It is the intent and purpose of the parties hereto that this Agreement shall promote and improve the industrial and economic relationships between the Company, the Union and its members as set forth herein and to set forth herein rates of pay, hours of work, and other

conditions of employment to be observed between the parties hereto.

SECTION 2: It is recognized by both parties that they have a mutual interest and obligation in maintaining friendly cooperation between the Company and the Union which will permit safe, economical and efficient operation of the plants.

ARTICLE VII—HOURS OF WORK

SECTION 3: Time and one-half (1½) will be paid for hours worked in excess of eight (8) in any day. Time and one-half (1½) will be paid for all hours worked in excess of forty (40) in any one week.

ARTICLE XIV—MEALS

SECTION 1: A lunch period shall be provided no later than five (5) hours from the start of an employee's shift, except when the shift does not exceed five and one-half (5½) hours.

ARTICLE XX—GRIEVANCE PROCEDURE

SECTION 1: Should the Union or any individual employee desire to process a grievance pertaining to a violation of the Agreement, the matter shall be handled according to the following steps:

STEP I

The employee involved, with a Union representative if he so desires, shall discuss the matter with his immediate supervisor. In the event he does not receive a satisfactory answer, he shall within Ten (10) days of the knowledge of the incident submit a written grievance to his immediate supervisor. The supervisor shall provide a written answer to the employee within seven (7) days.

STEP II

If the matter is not settled in the first step, the Union grievance committee or any officers designated by the Union

shall present the matter to the Plant Superintendent for his decision. Grievances in this Step must be presented within five (5) working days after the answer in the First Step. At this point the grievance presentation shall be made in writing on the Employee's and steward's own time. Meetings shall be scheduled as near as possible to shift changes.

Step III

If the matter is not settled in the second step, the Union grievance committee or any officer designated by the Union shall present the matter to the Plant Manager for his decision. Grievances in this step must be presented in writing within five (5) days after the answer at the second step. The Plant Manager shall have five (5) working days within which to give his answer in writing to the Union. Prior to submission to arbitration, the Union may request a further reasonable extension of time for the purpose of holding a meeting with the Vice President of Industrial Relations or his Designeee in an effort to resolve the grievance.

Section 2: Arbitration Provision—If at the final step of the Grievance Procedure the matter is not satisfactorily adjusted, the grievance or dispute may be submitted to an impartial arbitrator to be selected by mutual agreement of the parties. A written request for arbitration shall be made within thirty (30) days of the Step 3 answer. If within fifteen (15) working days after receipt of such written request the parties are unable to agree upon an arbitrator, either party shall request a list or lists of names from the Federal Mediation and Conciliation Service. The Union and the Company shall then alternately strike names until a single arbitrator is left. He will then be selected as the arbitrator for the arbitration in question. His decision in the grievance shall be final and binding on the parties, provided he shall not have authority other than to apply the terms and conditions specifically set forth in the Agreement. The arbitrator shall submit his decisions,

in writing, within thirty (30) days after the conclusions of the hearing, or hearings as the case may be. The compensation and necessary expenses of the arbitrator shall be borne equally by the Company and the Union.

SECTION 3: The parties agree that the time allowed to process grievances is adequate. If the Union fails to process a grievance in the time specified herein, the grievance in question is ended. However, if either party requests a reasonable extension, the time limit specified for the discussion between the Plant Manager and representative of the Union, the time specified in Section 1 hereof shall be extended.

Other Sections of Collective Bargaining Agreement

ARTICLE VI—COMPANY AND UNION RESPONSIBILITIES

SECTION 1: During the term of this Agreement there shall be no strike, stoppage, slow-down or suspension of work on the part of the Union or its members, or lock-out on the part of the Company. In the event of a breach of this provision, the Union shall immediately declare publicly that such action is unauthorized and shall promptly order its members to resume their normal duties notwithstanding the existence of any picket line. The Union further agrees that it will in no way interfere with the business of the Company by sanctioning or conducting a boycott on the handling of goods procured from a source or destined to a point where labor controversy may exist.

SECTION 2: The company shall have the right to determine the discipline given an employee or employees for breach of this Article. The Union shall, however, have the right to grieve the question of fact as to whether or not an employee or employees have breached the provisions of this Article.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON
(and 13 other individuals),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

LOUIS S. GOLDBERG
Counsel for Petitioner
300 Commerce Building
Sioux City, Iowa 51101

P. L. NYMANN
Co-Counsel for Petitioner
P. O. Box 515
Dakota City, Nebraska 68731

LOUIS S. GOLDBERG
and
P. L. NYMANN
On the Petition

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IN THE

Supreme Court of the United States

October Term, 1971

No.

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON, JAY NOLLEN,
KENNETH A. HARDER, DONALD J. SPORRER,
LAWRENCE W. KENNEDY, ALBERT WEAVER,
JAMES R. MORGAN, VAL JEAN JOHANNSEN,
RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN,
CAROL W. VENNINK, BEN J. LACKMAN,
LARRY JAMES LARRISON, LAWRENCE J. KABELA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

Petitioner, Iowa Beef Packers, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Iowa, filed April 9, 1971, affirming the judgment of the District Court of Crawford County, Iowa.

Opinions Below

The trial court's ruling, denying petitioner's Motion for Separate Adjudication of Law Points (that is, to dismiss for respondents' failure to invoke the grievance procedures of the collective bargaining agreement), on March 5, 1968 is printed in the appendix, *infra*, pages 1a - 2a. The Final Judgment and Decree by the trial court, filed October 20, 1969 is printed in the appendix, pages 3a - 4a. The Opinion of the Supreme

Court of Iowa, filed April 9, 1971 is reported at 185 N.W.2d 738 and is printed in the appendix, pages 8a - 23a.

Jurisdiction

The Opinions (majority and dissenting) of the Supreme Court of Iowa are dated and were entered, on April 9, 1971. The Clerk of that Court informs me that entry of Judgment in that Court must be deferred as there is on file the Stay Order dated April 29, 1971; the full text of that Order is printed in Appendix pages 6a - 7a. The statutory provision believed to confer on this court jurisdiction to review that judgment by writ of certiorari is 28 U.S.C. Section 1257 (3); and we believe the applicable rule of this Court is Rule 19 (1) (a).

Questions Presented

1. Whether, in the circumstances of this case, the prevailing opinion in the Supreme Court of Iowa erroneously read or erroneously applied the rule of the prevailing opinion in *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 27 L.Ed.2d 456, 91 S.Ct. 409 (January 13, 1971).

2. Is an employee, whose employment is in commerce or affects commerce, required to attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress, where, as here, his grievance arises from a right given the employee simply by that contract (a right to work-free mealtime) (and the breach of that right by the employer); or may the employee completely by-pass those grievance procedures and sue at once under Section 16 (b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219 (which act makes no provision for work-free mealtime)?

3. Where, as here, the Collective Bargaining Agreement awards the employee a regular rate of pay and overtime pay (and many "fringe" benefits) materially better than the minimum requirements of FLSA, may the employee who shares the benefits of that contract reject the contract obligation of grievance procedure as his remedy and seek, instead, the generalized remedy of action under FLSA?

4. Whether to permit a choice of remedies, between arbitration or suit, would tend to frustrate or erode the policy of Congress and this Court to fashion a body of arbitration law in implementing national labor relations policy, where, as here, the claim is simply for contract overtime pay for the employer's failure to honor a contract agreement to allow a work-free meal period.

5. Whether the Supreme Court of Iowa, in Division II of its prevailing Opinion (we do not here challenge its Division I), erred in sustaining the Ruling of the Trial Court rejecting petitioner's motion to require utilizing the contract grievance procedures.

STATUTES

Labor Management Relations Act, 1947 (LMRA) Section 203 (d), 61 Stat. 153, Section 301 (a) 61 Stat. 156, 29 U.S.C. Section 173 (d) and 185 (a), (in appendix, page 24a).

United States Arbitration Act, originally enacted by Act of February 12, 1925, c. 213, 1-15, 43 Stat. 883-886, codified in 1947 into Title 9, U.S.C., now 9 U.S.C. Section 3 (in appendix, page 25a).

Fair Labor Standards Act (FLSA), Act of 1938 as amended, now 29 U.S.C. 201-219, Section 16 (b), (in appendix, page 26a).

Statement of the Case

The 14 plaintiffs (respondents here), each for himself, brought 14 separate actions, by the same law firm, in the District Court of Crawford County, Iowa, against petitioner, claiming overtime pay, liquidated damages, attorney fees and costs under the Fair Labor Standards Act. The case was tried by ordinary proceedings without a jury. Not until the trial were the 14 cases consolidated; they were also consolidated for appeal to the Supreme Court of Iowa (Iowa's highest court). Appendix, page 5a.

All respondents were employed by petitioner in employment in interstate commerce or affecting commerce. Petitioner is engaged in the processing of meat and its distribution and sale throughout the United States. All respondents were em-

ployed in the maintenance department, their duties being chiefly to maintain and repair plant machinery and equipment used by petitioner in the processing of meat.

Respondents' employment was governed by the Collective Bargaining Agreement effective from and after February 12, 1965; made between petitioner and Associated Employees Organization ("the Union"). In that contract, Article XIV provides for a "lunch period" (appendix, page 27a); it is agreed that the period was to be of 30 minutes' duration.

The respondents, in their action at law, asserted that during the period of two years preceding the filing of their actions (13 filed on April 21, 1967, and one on Dec. 12, 1967) they were, in effect, denied their contract right of a 30-minute work-free meal period, in that they were required to be "on call" during their lunch period, each work day. Accordingly, each claimed to be entitled to pay at the contract overtime rate for each such half-hour during the period of two years. The Trial Court found these facts in favor of respondents (appendix pages 3a - 4a); these findings were affirmed by Division I of the prevailing Opinion of the Supreme Court of Iowa (appendix pages 8a - 11a); while petitioner does not concur in the correctness of those findings, we do not here challenge them.

However, petitioner did challenge, by Answer and by Motion in each of the 14 cases (both in the Trial Court and in the Supreme Court of Iowa), all of the actions as premature because all respondents (by their own admission) failed to attempt to exercise the grievance procedures contracted for in the Collective Bargaining Agreement. The Trial Court overruled petitioner's Motion (appendix pages 1a - 2a); the Supreme Court of Iowa, in Division II of its prevailing Opinion, affirmed, (appendix, pages 12a - 14a); hence this Petition for a Writ of Certiorari.

The Collective Bargaining Agreement in its Article III (appendix page 27a) states the "intent and purpose of the parties" to be to "promote and improve the industrial and economic relationships between the Company, the Union and its members..."

Article VII of that Agreement (appendix page 27a) deals with "Hours of Work" and provides for time and one-half (1½) to be paid for hours worked in excess of 8 in any day (and in excess of 40 hours in any one week).

Article XX - "Grievance Procedure" (appendix pages 27a - 29a) provides for "the Union or any individual employee" a grievance procedure in 3 steps, concluding with arbitration provisions.

Respondents' substantive claims rest solely and simply on the contract provision for work-free meal-time and the petitioner's alleged breach of that commitment. The Fair Labor Standards Act contains no provision for meal-time. Respondents have availed themselves of all the benefits of the Collective Bargaining Agreement (benefits that are materially greater than those required by FLSA); but, admittedly, respondents refused to fulfill their contract obligation to attempt grievance procedures and arbitration as their remedy.

Federal Questions: How Raised

Petitioner raised the question here at issue in paragraph 10 of its Answers in each of the 14 cases in the Trial Court. The full text of paragraph 10 now follows:

"10. Plaintiff states affirmatively that it is now admitted upon this record that Plaintiff's employment at Defendant's plant in Denison was covered by Collective Bargaining Agreements at all times material herein between Associated Employees Organization and Defendant and that Exhibit 'A' attached to the Request for Admissions is a true and correct copy of the Collective Bargaining Agreement for the time specified therein and that Plaintiff did not take any of the Steps permitted under the Grievance Procedures of the Collective Bargaining Agreements. Accordingly Plaintiff having failed to exhaust such Grievance Procedures is not entitled to bring this action and this action should be dismissed for such failure.

"WHEREFORE Defendant prays that Plaintiff's action be dismissed at Plaintiff's costs."

Then, before proceeding to trial, petitioner filed its Motion for Separate Adjudication of Law Points; that Motion, in full text, follows:

"Motion for Separate Adjudication of Law Points

"COMES NOW the Defendant and moves the Court to separately hear and determine the point of law raised in Paragraph 10 of its Answer, as provided by Rule of Civil Procedure 105, because said point of law raises a legal issue directed to substantially the whole if not the whole of the Plaintiff's alleged cause of action and adjudication favorably to the Defendant will dispose of substantially all, if not all, of the case."

The Ruling of the Trial Court, overruling that Motion, is printed in the appendix, pages 1a to 2a.

The entire Record of the Trial Court was appealed by petitioner to the Supreme Court of Iowa; that Court, in Division II of its prevailing Opinion, affirmed the ruling and judgment of the Trial Court (appendix pages 12a to 14a).

Summary of Petitioner's Reasons

An employee who asserts a substantive right arising from a Collective Bargaining Agreement must, for remedy, attempt to utilize the grievance and arbitration provisions of that Agreement. He may not proceed directly to court action under the Fair Labor Standards Act.

Our view is supported by (a) Congressional policy declared in the Labor-Management Relations Act, 1947; (b) the decisions of this Court in formulating procedure in a national labor relations policy, with special reference to *Republic Steel Corporation* v. *Maddox*, (1965), 379 U.S. 450, 85 S.Ct. 614, 13 L.Ed.2d 580; (c) four United States Courts of Appeals decisions in Fair Labor Standards Act cases; (d) the dissenting opinion of the Supreme Court of Iowa in the present case; and (e) the dissenting opinion in *U. S. Bulk Carriers, Inc. v. Arguelles, supra.*

Nor do the prevailing opinion in *Arguelles* or in this case stand in the way. *Arguelles* is distinguishable on the facts and on the law.

Maddox, not *Arguelles*, applies here.

Argument Amplifying the Reasons Relied On

The prevailing Opinion below (it states "the question is close") accords priority to court action under the Fair Labor Standards Act as against grievance procedure and arbitration. In doing so, that Opinion rests largely, if not wholly, on the prevailing Opinion of this Court in *U. S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 27 L.Ed.2d 456, 91 S.Ct. 409, decided January 13, 1971. With all deference to the Iowa Opinion, we believe that *Arguelles* does not warrant the Iowa conclusion in our case; with all respect, we believe the Iowa prevailing Opinion reads *Arguelles* erroneously or applies it erroneously.

Opposed to that Iowa Opinion are these: Four decisions of United States Courts of Appeals, cited in the opinion itself, ruling "In accordance with this general rule," .... "that employees must attempt to arbitrate FLSA claims before they can come to court."; the Iowa dissenting Opinion in our case, discussing, inter alia, the same four Courts of Appeal decisions; the dissenting Opinion in *Arguelles* in this Court; and we believe the considerations stated by Justice Harlan in his concurring opinion in *Arguelles* may tend to support our view in favor of requiring that utilization of grievance procedures should apply in our case. We shall return to these later, herein.

Arguelles Distinguished:

We begin by indicating material differences in the facts and in the law, distinguishing *Arguelles*. The substantive claims of respondents here rest entirely and simply on the Collective Bargaining Agreement. That contract, Article XIV (appendix page 27a) (not FLSA) commits the Company to allow its employees one-half hour of work-free meal-time; for any breach of that obligation, the Company (petitioner) must pay as for time worked, at the overtime rates stipulated in the

contract; and those rates are materially higher than the FLSA minimum provisions. By constrast, in *Arguelles*, his Brief (page 15) asserted that "the well-spring of his right is not the collective bargaining agreement, but the text of the statutes and the court's interpretation of them." Here, the Iowa prevailing opinion itself recites: "Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period." (Appendix, page 9a, second paragraph).

On the law side, there is sharp distinction, too. In *Arguelles*, the statute imposed the civil penalty, irrespective of any improper shortage, as a weapon to enforce prompt payment of seamen's wages; the statute was traced as far back as 1790; it evidenced the continuing traditional policy of our government in solicitude for the protection of seamen as wards of admiralty; it singled out a special sub-class of employees for special and different treatment. All this is stressed throughout the briefs and prevailing opinion in this Court.

Not so, the FLSA; the FLSA is written in broad, generalized strokes, suited to a wide variety of circumstances and of needs; like the LMRA, the FLSA is open to all employees engaged in commerce or in activities affecting commerce; it is one of a set of Acts serving to formulate national labor policy, all of relatively recent vintage; indeed, FLSA was enacted a decade later than the United States Arbitration Act of 1925. Moreover, FLSA contains so many administrative provisions and such extensive authority to the Wage and Hour Administrator for court actions, including injunctive relief, that there is need in FLSA *to make clear that action in court is available to the individual employee who is not shielded by a Collective Bargaining Agreement and a Union.*

Indeed, in the typical FLSA case, there is no substantive contract right; there is no breach; the wrong consists of violation of the statute; there could be no remedy if the statute did not provide a remedy by administrative enforcement or by action in court. Actually, the administrative procedures are so efficient that only a minor fraction of cases get into the court.

Grievance Procedures a Better Remedy:

The case at bar demonstrates rather neatly that, given a Collective Bargaining Agreement, the grievance procedures and arbitration provide a remedy superior to individual action in court. Here we have 14 respondents, with 14 separate lawsuits (apparently so deemed advantageous by the one firm of lawyers who acted for all fourteen), with 14 separate sets of pleadings and motions, finally consolidated for trial and appeal. A single, simple grievance claim under the Agreement would have sufficed. It is interesting to note that the court did not award "liquidated damages" to any of the claimants. Except for the issue as to failure to attempt grievance procedures, all the questions in the 14 cases were purely factual, singularly suited to arbitration by persons well versed in the industry: (a) Were the employees subject to call during their supposedly work-free meal-time? (b) How much is due each? Also, implicit in all four United States Courts of Appeals FLSA cases cited in both of the opinions of the Supreme Court of Iowa, is the point that the arbitrators can and will apply the relief provisions of FLSA; and in *Evans v. Hudson Coal Co.*, (1948), CA-3, 165 F.2d 970, the court is explicit: "But if the arbitration process proceeds to an award which is not in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute, Sections 10 and 11 of the Arbitration Act provide means for its vacation, rehearing, modification or correction."

It may not be amiss to observe here that, unlike so many court cases under FLSA, petitioner was not charged with substandard wage rates, either as regular rates of pay or as overtime, wrongs which FLSA is especially designed to remedy. Quite the contrary: under the Collective Bargaining Agreement the respondents enjoy rates of pay, both regular and overtime, at substantially twice the level commanded by FLSA (to say nothing of such significant "fringe" benefits as profit-sharing, a guarantee of 40 hours of pay each week, vacation pay, rest periods on company time, insurance benefits at no cost to employees, etc.). Enjoying these superior advantages all derived from the Collective Bargaining Agreement, the respond-

ents admittedly elected to refuse to respect their obligations for grievance procedure and arbitration under that Agreement.

Discussion of the Iowa Opinions:

The prevailing Iowa opinion states (appendix page 13a): "The Fair Labor Standards Act too antedates the Labor Management Relations Act." Literally, that may be a correct statement. However, the United States Arbitration Act dates from 1925; in 1947 Section 301 of LMRA brought the arbitration policy to the forefront, since which time (20 years before the cases at bar were begun), FLSA and LMRA have marched hand in hand in American labor policy. Also, even before 1947 the 1925 Arbitration Act was held to be applicable to FLSA cases: *Donahue* v. *Susquehanna Collieries Co.*, (1942) CA-3, 138 F.2d 3 and *Watkins* v. *Hudson Coal Co.*, (1945) CA-3, 151 F.2d 311.

The dissenting Opinion of the Supreme Court of Iowa is, we believe, a persuasive brief for petitioner's position; we are happy to be privileged to present it to this Court. May we, with complete respect, point to three places in that minority Opinion where, we believe, our view and the view of the dissenting Justices are set forth with somewhat less definiteness than they merit? In all three instances the portions that we shall quote might be read as recognizing that the substantive rights claimed by the respondents derive from statute; the correct view, we are convinced, is that their substantive rights flow simply from the Collective Bargaining Agreement. The sentences here concerned are these: (Appendix page 16a): "Plaintiffs do not quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement." (Appendix page 20a): "These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision." (Appendix page 20a): "Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on

the contract." The sentences we have quoted were probably written in terms of remedial rights rather than in terms of substantive rights; so viewed, there is no confusion, and our case is the stronger.

Meal-time Is Strictly a Contract Right:

Given the employer-employee relationship, there is nothin the FLSA that requires an employer commitment to work-free lunch-time. Where an employer makes such a commitment by contract, he must, of course, bear the consequences of a breach. In this, the FLSA is quite unlike the statute in *Arguelles;* there the statute granted (to a special group as "wards of the Admiralty") both the right and the remedy. The FLSA remedy may (not must) include liquidated damages and attorney fees, enforceable, as we have noted, by arbitration.

Discussion of the Cases:

To avoid burdening this Court with repeated citations and quotations, may we indicate briefly that the applicable underlying points and case citations supporting petitioner's views are set forth in the four opening paragraphs of Division II of the prevailing Opinion of the Iowa court (appendix page 12a) (but the majority "are inclined to think" "that the United States Supreme Court will apply *Arguelles* to FLSA cases" "although the question is close.") (appendix page 13a); and they appear at considerable length, with quotations, in the *dissenting* Opinion in Iowa (appendix pages 15a to 23a); and in the dissenting Opinion of this Court in *Arguelles*. We respectfully incorporate those as part of petitioner's argument, and limit our discussion to the following:

Republic Steel Corporation v. *Maddox* (1965), 379 U.S. 650, 85 S.Ct. 614, 13 L. Ed.2d 580 was an action brought in a *State* court in Alabama for severance pay under a collective bargaining agreement. *Maddox* made no effort to utilize the grievance and arbitration procedures. Instead, he sued for breach of contract. The trial court awarded him a money judgment; two higher State courts of Alabama affirmed. This Court reversed. In an opinion by Mr. Justice Harlan, writing for eight members of the Court, this Court ruled that the gen-

eral federal rule applies, that the employee must attempt use of the contract grievance procedure. We respectfully submit that *Maddox*, (not *Arguelles*), rules our case.

In *Arguelles*, Mr. Justice White, writing for four members of the Court, stated (p. 473 of 27 L.Ed.2d) that all issues in that case (including the question of the statutory penalty) were suitable for arbitration. And, on the same page, he noted that "circuit courts of appeal both before and after passage of Section 301 have required that FLSA employee's claims for liquidated damages under 29 USC section 216 (b) for failure to pay overtime wages be referred to contractual procedures before being presented to the court."

The FLSA Cases:

We find four such FLSA cases: *Donahue* v. *Susquehanna Collieries Company* (CA 3) (1943) 138 F.2d 3 (claim for overtime wages); *Watkins* v. *Hudson Coal Company* (CA 3) (1945), 151 F.2d 311 (cert. denied 1946, 327 U.S. 777 and 816) (claim for overtime wages, liquidated damages, attorney fees and costs) (in that case the opinion states "A brief has also been filed for the Administrator of the Wage and Hour Division, United States Department of Labor"); *Evans* v. *Hudson Coal Company* (CA 3) (1948), 165 F.2d 970 (claim for regular and overtime pay, liquidated damages, fees and costs); and *Beckley* v. *Teyssier* (CA 9) (1964), 332 F.2d 495 (claim for overtime pay for time in travelling between job sites, and liquidated damages, fees and costs). We may observe, in passing, that *Gatliff Coal Co.* v. *Cox* (CA 6) (1944), 142 F.2d 876, is no longer to the contrary, having been decided three years before the 1947 LMRA.

National Labor Relations Policy:

The dominant consideration, we respectfully submit, is that there be no frustration or erosion of the Congressional policy declared in the 1947 LMRA and the endeavors of this Court seeking to formulate harmonious procedures in a national labor relations policy. And is it not of significant public importance that the contours of the *Arguelles* case be delineated before the uncertainties generated by *Arguelles* with-

in the Supreme Court of Iowa spawn a host of conflicting and confusing decisions throughout the United States?

CONCLUSION

For the foregoing reasons, we respectfully submit, this petition for a writ of certiorari should be granted.

Dated at Sioux City, Iowa, June 7, 1971.

Respectfully submitted,

LOUIS S. GOLDBERG
Counsel for the Petitioner
300 Commerce Building
Sioux City, Iowa 51101

P. L. NYMANN
Co-Counsel for the Petitioner
P. O. Box 515
Dakota City, Nebraska 68731

LOUIS S. GOLDBERG
and
P. L. NYMANN
On the Petition

Hamilton Printing – Chicago, Illinois

(APPENDIX)

Ruling of Trial Court Denying Petitioner's Motion to Dismiss

IN THE DISTRICT COURT OF IOWA, IN AND FOR CRAWFORD COUNTY

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA,

Plaintiffs,

vs.

IOWA BEEF PACKERS, INC.,

Defendant.

No. 21894 - Law
Applicable to
Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

Before the HONORABLE A. J. BRAGINTON, Judge.

Ruling filed March 5, 1968 (in each of 14 cases).

On Motion for Separate Adjudication of Law Points (motion filed September 19, 1967).

The defendant is asking the court to determine the points of law raised in paragraph 10 of it's answer. (sic)

In this action the plaintiff is seeking compensation for 30 minute meal periods for which he has not been compensated. Plaintiff asserts that in the performance of his duties in his employment by the defendant he was required to be subject to call during said meal periods, and that by reason

of his being subject to call, said period of time was and is a necessary and integral part of defendant's operation and and therefore such periods are compensable under the act. Defendant admits plaintiff was not paid for such periods, and asserts that plaintiff was not required to be subject to call during said periods and such periods of time are not compensable.

If upon trial it was found that under the act such 30 minute meal periods are compensable, the fact that his employment in defendant's plant was subject to a collective bargaining agreement or that plaintiff did not proceed as provided under the grievance procedures of such agreement and thus failed to exercise the grievance provisions of the agreement, such does not preclude recovery by the plaintiff for wages due for work which is compensable under the act, and it follows that defendant would not be entitled to have plaintiff's case dismissed as alleged in paragraph 10 of it's answer. (sic)

This court determines that the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act of 1938 as amended, cannot be restricted, abrogated or nullified by any agreement entered into by an employee and employer, or by employees with their employer, or by and through a collective bargaining agreement entered into with the employer and the representative of the employees.

BY THE COURT: (signed) A. J. BRAGINTON,
Judge.

Final Judgment and Decree of Trial Court

IN THE DISTRICT COURT OF IOWA, IN AND FOR CRAWFORD COUNTY

EDWARD D. THOMPSON, (and 13 others) Plaintiffs, vs. IOWA BEEF PACKERS, INC., Defendant.	No. 21894 - Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106

Before the Honorable A. J. BRAGINTON, Judge.

On October 20, 1969, there was filed

Final Judgment and Decree

On the 5th day of February, 1969, this court entered a judgment determining that the Plaintiffs are entitled to recover for their one-half hour lunch period at the applicable wage scale or rate as such maintenance employees of the Plaintiff for such time as they were so employed by the Defendant company during the two-year period immediately preceding the commencement of their respective actions.

On July 8, 1969, as the result of a motion to amend and enlarge the findings and to modify the judgment, this court directed the parties to submit the hours of employment and rate of pay pertaining to each Plaintiff under the judgment entered herein on February 5, 1969, and the court therein determined that none of the Plaintiffs had shown themselves to be entitled to liquidated damages.

On the 15th day of September, 1969, this court by order directed that a hearing be held on this date relative to the matter of the attorney fees, and on this date the parties have filed a stipulation in which the basic compensation of each

Final Judgment and Decree of Trial Court

of the Plaintiffs was fixed for the purposes of the suit without waiving any right of appeal. At said hearing the court approved certain attorney fees in respect to each of the cases.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that the Plaintiffs in each of their respective cases have and recover from the Defendant the amounts hereinbelow set forth after their names, and in each of the respective cases the Plaintiff shall have and recover the total judgment as shown therein, with interest at the legal rate from and after February 5, 1969, together with the costs in each action to be entered by the clerk.

NAME	Basic Compensation	Attorney Fees	Total Judgment
Edward D. Thompson	$1,261.33	$200.00	$1,461.33
Jay Nollen	1,288.87	200.00	1,488.87
Kenneth A. Harder	244.82	150.00	394.82
Donald J. Sporrer	1,338.44	200.00	1,538.44
Lawrence W. Kennedy	1,338.44	200.00	1,538.44
Albert Weaver	1,288.87	200.00	1,488.87
James R. Morgan	1,338.44	200.00	1,538.44
Val Jean Johannsen	1,338.44	200.00	1,538.44
Raymond James Johnson	1,338.44	200.00	1,538.44
Luverne M. Hoffman	1,338.44	200.00	1,538.44
Carol W. Vennink	1,261.33	200.00	1,461.33
Ben J. Lackman	1,261.33	200.00	1,461.33
Larry James Larrison	658.48	150.00	808.48
Lawrence J. Kabela	274.12	150.00	424.12

The clerk is hereby ordered and directed to enter judgment in favor of the Plaintiff in his respective action against the Defendant for the basic compensation and attorney fees as above set out, together with the costs in said action, said judgment to bear interest at the legal rate from February 5, 1969.

BY THE COURT: (signed) A. J. BRAGINTON,
Judge.

Order of Supreme Court of Iowa to Consolidate 14 Cases

IN THE SUPREME COURT OF IOWA

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, Plaintiffs,	No. 21894 - Law Applicable to Law Nos. 21895, 21896, 21897, 21898, 21899, 21900, 21901, 21902, 21903, 21904, 21905, 21906, 22106
vs.	
IOWA BEEF PACKERS, INC., Defendant.	

May 20, 1970.

Order of Consolidation

And now on this 20th day of May, 1970, there having been presented to the undersigned, one of the Justices of the Supreme Court of Iowa, a joint Motion by all parties for the consolidation of these cases on appeal, with a waiver of notice of hearing by all parties;

And it appearing that for good cause shown the cases should be consolidated for purposes of appeal.

FOR THE COURT: (signed) MAURICE E. RAWLINGS
Justice of Supreme Court of Iowa

Order by Supreme Court of Iowa, Granting Stay

IN THE SUPREME COURT OF IOWA

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, Appellees,	)	April 29, 1971
vs.	)	ORDER
IOWA BEEF PACKERS, INC., Appellant.	)	213 / 54323

NOW on this 29th day of April, 1971, defendant's application to stay execution of procedendo herein, having come on for hearing pursuant to prior order, defendant-applicant having appeared by Attorney Louis S. Goldberg, of Sioux City, Iowa, plaintiff having appeared by Attorneys E. A. Raun and Michael Mundt, of Denison, Iowa, arguments were duly presented, the matter submitted and taken under advisement.

IT IS NOW ORDERED, ADJUDGED AND DECREED that execution of procedendo herein be and is hereby stayed for seventy (70) days from date hereof to allow defendant-applicant to petition the Supreme Court of the United States of America for review, and

IT IS FURTHER ORDERED in the event such petition be not filed within the aforesaid time, procedendo shall issue

upon expiration of said seventy (70) day period, and

IT IS FURTHER ORDERED, in event such petition be so filed within the time above prescribed, then the aforesaid stay shall remain in effect until the Supreme Court of the United States of America shall have finally acted upon such petition for review, and (1) if denied then procedendo shall thereupon issue, (2) if granted said stay shall be and remain in effect until the matter shall have been finally determined by the Supreme Court of the United States of America, and

IT IS FURTHER ORDERED, for good cause shown, bond is hereby waived.

DONE this 29th day of April, 1971, in Sioux City, Iowa.

(signed) MAURICE E. RAWLINGS
Justice, Supreme Court of Iowa

Majority Opinion by Supreme Court of Iowa

IN THE SUPREME COURT OF IOWA

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA,

Appellees,

vs.

IOWA BEEF PACKERS, INC.,

Appellant.

Filed April 9, 1971

213

54323

Appeal from Crawford District Court—A. J. BRAGINTON, Judge.

Appeal from judgment for plaintiffs for overtime compensation under Fair Labor Standards Act.—Affirmed.

P. L. NYMANN, of Dakota City, Nebraska, for appellant.

RAUN & FRANCK, of Denison, for appellees.

UHLENHOPP, J.

The main question presented in this appeal is whether workmen are required to attempt contract arbitration before they can sue for overtime compensation under the Fair Labor

Standards Act (FLSA), 29 U.S.C.A. §§ 201-219.

The case was tried by ordinary proceedings without a jury. From the evidence the trial court could reasonably find that plaintiffs were maintenance men in defendant's plant near Denison, Iowa, during the period in question from April 28, 1965, to April 28, 1967. The plant was fairly new. During the first years many breakdowns occurred, necessitating much work by the maintenance men to avoid costly "down time." A bell was sounded when the men were needed. After the plant had been constructed, a lunch room for the maintenance men was added just off the kill floor so they could answer the bell more readily.

Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period. The evidence clearly indicates, however, that until February of 1966, the lunch period existed more in name than in fact. On numerous occasions the men were obliged to answer bells during lunch. When they tried to eat lunch later, they would frequently be interrupted again by the bell.

Eventually one of the maintenance men undertook grievance procedure because he was not getting his lunch period. This precipitated a meeting by defendant's industrial relations officer with the maintenance men in February, 1966. That officer instructed the men that they were free to leave the premises during their lunch period.

The instructions appear to have been honored by the employer more in the breach than in observance. Breakdowns continued to occur, the production people needed immediate help from the maintenance men, the bell continued to be rung during lunch periods, and the maintenance men were expected to, and did, respond. The situation did not in fact change from what it had been. A procedure for two shifts of maintenance men was attempted, but did not prove efficacious.

On April 28, 1967, plaintiffs commenced this action for compensation for their lunch periods during the preceding two years. Shortly thereafter, the industrial relations offi-

cer dealt with the situation in a letter which was sent to each maintenance man. That letter, however, related to the future.

The collective bargaining contract between the union and defendant provided grievance procedure including arbitration. The trial court overruled defendant's contention that the men had to arbitrate before they could sue, held on the facts that the maintenance men were actually on call during their lunch period for the two years in question, and granted the men compensation accordingly. Defendant appeals.

Defendant makes three contentions here. First, the workmen were not on call during lunch periods after the instructions were given in February 1966 to the effect they could leave the premises during such periods. Second, one of the workmen who said he always got his 30 minutes for lunch at some time during the day could not in any event claim he had not gotten his lunch periods. Third, the men had to attempt arbitration before they could sue.

I. Defendant's first two contentions are primarily factual and may be considered together. The trial court's findings of fact, if supported by substantial evidence, bind us. *Rule* 344(f)(1), *Rules of Civil Procedure*.

The legal principle regarding compensable time under FLSA for being "on call" was announced in *Armour & Co.* v. *Wantock*, 323 U.S. 126, 65 S. Ct. 165, 89 L. Ed. 118. The decisions lay stress on whether the employees are actually free to pursue their own interests during their lunch period. If, in fact, the employer retains a hold on the employees for services when needed during a lunch period, so that the employees are not actually at liberty, the period constitutes compensable time. *Glen L. Martin Nebraska Co.* v. *Culkin*, 197 F.2d 981 (8th Cir.); *F. W. Stock & Sons* v. *Thompson*, 194 F.2d 493 (6th Cir.); *Wirtz* v. *Minton Rendering Co.*, 54 Lab. Cas. Para. 31,876 (U.S. Dist Ct. N.D. Tex.); *Hofler* v. *Spearin, Preston & Burrows*, 51 Misc. 2d 758, 273 N.Y.S.2d 873.

Here the men had 30 minutes for lunch. It hardly seems reasonable that the parties contemplated the men would drive from the plant to their homes or other places, eat, drive back, and be back on time. In fact, a separate lunch building was provided for them on the premises, where they would hear the bell. On numerous occasions, both before and after February 1966, they were actually called during the lunch period. On cross-examination, defendant's witness LaFleur admitted with commendable candor, "If it was a serious breakdown and the men were present, were readily accessible, they were asked to help with the breakdown, yes; if they were on their lunch break. If they were called on their lunch break and given a lunch break later, the same thing could happen. They would have to answer the bell then, too." Defendant's witness Walker made somewhat similar admissions. Defendant's witness O'Brien, telling about frequent breakdowns before new equipment was installed in recent times, stated in a letter that "The maintenance men will remember the thousands of times they had to run because the boilers have dropped out"; "Many will remember the loss of steam that caused hours of dying time and lost profits"; "The maintenance men will remember the long hard hours of work put in on the sump under the coolers."

As to the period subsequent to February 1966, the trial court found the situation was no different than before—the men were actually on call. We do not say we would reach the same finding on the evidence, but substantial evidence supports the trial court's finding.

As to the contention that one workman actually got his 30 minutes for lunch each day, we think defendant misapprehends the rationale of *Armour & Co.* v. *Wantock*. The question is not whether a workman actually gets his 30 minutes without interruption. The question is whether he is on call during that period, or free to pursue his own interests. He may get his lunch times without interruption every day for a week or at various times throughout a given day. But if those times in fact belong to the employer, if the employee

is not free but is actually subject to call during those times, then the times are compensable. The trial court could reasonably find that such was the situation here.

We cannot sustain defendant's challenges to the findings of fact.

II. What about defendant's contention that plaintiffs had to attempt arbitration before they could sue? The contract under which plaintiffs worked contained a provision for four-step grievance procedure culminating in binding arbitration. Plaintiffs did not pursue that course but brought their complaint directly to court. Did they have the choice of arbitration or litigation, or were they obliged to try arbitration first?

Defendant is engaged in interstate commerce, and substantive federal labor law applies. *Humphrey* v. *Moore*, 375 U.S. 335, 84 S. Ct. 363, 11 L. Ed. 2d 370. The present controversy is undoubtedly arbitrable. *Donahue* v. *Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir.). Agreements to arbitrate may ordinarily be specifically enforced. *United Steelworkers of America* v. *Warrior Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409.

As a general rule, federal labor policy requires that employees seeking to assert grievances must initially attempt to use contract grievance procedure including arbitration. *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972; *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580. These decisions are founded on § 301(a) of the Labor Management Relations Act of 1947 (LMRA), 29 U.S. C.A. § 185(a).

In accordance with this general rule, federal courts of appeal have held that employees must attempt to arbitrate FLSA claims before they can come to court. *Donahue* v. *Susquehanna Collieries Co.*, *supra*; *Watkins* v. *Hudson Coal Co.*, 151 F.2d 311 (3rd Cir.); *Evans* v. *Hudson Coal Co.*, 165 F.2d 970 (3rd Cir.); *Beckley* v. *Teyssier*, 332 F.2d 495 (9th Cir.). Some federal and state trial courts had previously held to the contrary. Annot., 24 A.L.R.2d 752.

The United States Supreme Court does not appear to have spoken on the problem as to FLSA claims, but it recently decided *U.S. Bulk Carriers v. Arguelles*, 91 S. Ct. 409, 27 L. Ed. 2d 456 (U.S.). A federal statute which antedates the Labor Management Relations Act, requires a master or owner of a vessel to pay seamen promptly, failing which the seamen are entitled to recover "two days pay for each and every day during which payment is delayed ... which sum shall be recoverable as wages in any claim made before the Court...." 46 U.S.C.A. § 596. In *Arguelles*, a majority of the Court thought that statute indicated Congressional intent to permit a seaman to sue without first attempting arbitration, which prevailed over Congressional intent favoring prior arbitration generally.

Does the Fair Labor Standards Act indicate similar Congressional intent, leading to the belief that the United States Supreme Court will apply *Arguelles* to FLSA cases? We are inclined to think so, although the question is close.

The Fair Labor Standards Act too antedates the Labor Management Relations Act. It also contains provisions for court proceedings and penalties, indeed, considerably more elaborate provisions than the statute involved in *Arguelles*. Under FLSA, an employer is liable to an employee for overtime pay and "an additional equal amount as liquidated damages." Action to recover such amounts "may be maintained in any court of competent jurisdiction." An employee may bring a class action with consent of the class—for himself "and other employees similarly situated." A plaintiff who is successful is entitled to "a reasonable attorney fee to be paid by the defendant, and costs of the action." The Secretary of Labor is authorized to supervise payment of unpaid overtime compensation owing an employee. The Secretary may sue to recover such overtime for an employee when so requested by him. All of these rights are contained in § 16 of FLSA, 29 U.S.C.A. § 216. In addition, the federal district courts have broad jurisdiction to enjoin violations of FLSA requirements. § 17, 29 U.S.C.A. § 217.

As stated, the federal decisions generally requiring arbitration are founded mainly on § 301(a) of the Labor Management Relations Act, giving federal courts jurisdiction to enforce collective bargaining contracts--including arbitration clauses of such contracts. We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the courts in FLSA cases. We are the more persuaded of that view by the broad Congressional policy expressed in § 2 of FLSA, 29 U.S.C.A. § 202. There the objectives of the act are set forth, and those objectives encompass more than simply wage relief for employees; they include broad economic considerations--improvement in commerce among the states. The remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of those broader objectives. We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's act involved in *Arguelles*, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act.

Affirmed.

BECKER, LEGRAND and REES, JJ. concur,
MASON, J. concurs in result,
STUART, J. and MOORE, C.J. dissent,
RAWLINGS, J. takes no part.

Dissenting Opinion by Supreme Court of Iowa

STUART, J., dissenting.

I respectfully dissent from division II and the result. As a consequence, I would not reach the merits of the case. Federal law applies. My study of the federal cases leads me to conclude that plaintiffs were required to exhaust the grievance procedures, including arbitration, contained in the collective bargaining agreement covering the plant where they were employed before they could institute this action for overtime pay under the Fair Labor Standards Act, 29 U.S.C.A. §201-219 (FLSA).

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available." *Republic Steel Corporation* v. *Maddox*, (1965), 379 U.S. 650, 652, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583.

Under federal law, agreements to arbitrate may be specifically enforced. *Local Union No. 721* v. *Needham Packing Co.* (1963), 254 Iowa 882, 885, 119 N.W. 2d 141, 142; *United Steelworkers of America* v. *American Mfg. Co.* (1960), 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409; *United Steelworkers of America* v. *Enterprise Wheel and Car Corporation* (1960), 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 1424.

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts

should be resolved in favor of coverage." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra*, 4 L. Ed. 2d at 1417-1418; quoted in *Local Union No. 721* v. *Needham Packing Co.*, (1967), 160 Iowa 908, 912, 151 N.W. 2d 540, 543.

Plaintiffs do not quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement. The narrow issue is whether a claim for overtime wages under the FLSA is an exception to these general rules.

Although the United States Supreme Court has not decided this issue, the federal circuit courts that have considered it hold grievance procedures must be exhausted before these statutory rights can be enforced in the federal courts. *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F. 2d 945; *Evans* v. *Hudson Coal Co.* (3rd Cir. 1948), 14 CCH Lab. Cas. Par. 64,318, 165 F. 2d 970; *Watkins* v. *Hudson Coal Co.* (3rd Cir. 1945) 10 CCH Lab. Cas. Par. 62,761, 151 F. 2d 311; *Donahue* v. *Susquehanna Collieries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F. 2d 3; Anno. 24 A.L.R. 2d 754, 764-766, 779-780.

Earlier New York and federal district court cases to the contrary have not been followed. *Bailey* v. *Karolyna Co.* (1943, DC NY), 50 F. Supp. 142, CCH Lab. Cas. Par. 61,550; *Voutrey* v. *General Baking Co.* (1941, DC PA), 39 F. Supp. 974; *Garrity* v. *Bagold Corp.* (1943), 180 Misc. 120, 42 N.Y.S. 2d 257, mod. on other grounds 257 App. Div. 353, 46 N.Y.S. 2d 637; *McClintock* v. *Garment Center Capitol, Inc.* (1943), 112 NYJL 1022, CCH Lab. Cas. Par. 61,814; *Re City Bank Farmers Trust Co.* (1943), 179 Misc. 770, 39 N.Y.S. 2d 842.

The FLSA does not provide that such rights *shall* be enforced in the courts. If it did, a collective bargaining agreement providing for arbitration would be ineffective. In the

absence of a specific prohibition, the parties may agree between themselves how these rights shall be enforced.

"Is there anything about the Fair Labor Standards Act which removes claims under its terms from the arbitration clause? We may concede that Congress could have done so had it wished. It could have provided that any claim under the act was to be enforced by lawsuit only, notwithstanding any agreement between parties for any other method of settlement. There is no such express language. * * *

"* * * (W)e see nothing in the wording of the Fair Labor Standards Act which precludes arbitration of claims under it. No doubt it creates rights which make a basis of a claim by an employee against an employer who violates it. So does any contract. A claim under the act and a claim based on a contract, -- each is based on a legal right which claimant asserts against someone else. Arbitration is one way by which such right can be enforced. There is no reason why it cannot be availed of to secure rights under the Fair Labor Standards Act just as well as a right arising out of a contract or imposed by law as a consequence of a tort." *Donahue* v. *Susquehanna Collieries Co.* (3rd Cir. 1943), 7 CCH Lab. Cas. Par. 61,758, 138 F. 2nd 3.

In *Beckley* v. *Teyssier* (9th Cir. 1964), 49 CCH Lab. Cas. Par. 31,589, 332 F. 2d 945, plaintiffs brought an action in the federal court to recover overtime pay for traveling to and from work under the FLSA. The proceedings were stayed by the district court. The circuit court affirmed saying:

"The appellants contend that since they seek recovery under the provisions of the Fair Labor Standards Act and not under the Collective Bargaining Agreement, the district court erred in staying the civil action pending arbitration under the Collective Bargaining Agreement. Appellants support such contention by arguing that whether

the time spent by them in traveling to and from the barracks to the job site constitutes hours worked under the Fair Labor Standards Act is a legal question which must be determined by the courts without reference to the provisions of the Collective Bargaining Agreement, and presents a question which cannot be determined by an arbitrator. Appellants cite no provision of the Fair Labor Standards Act which precludes arbitration of claims arising under it. We have found none. * * *

"It is clear to us that the claims of appellants are ones growing out of the relation of employer and employee and necessarily involve the application and interpretation of the contract provisions above quoted, and therefore fall squarely within Article V of the Collective Bargaining Agreement. See *Evans* v. *Hudson Coal Co.*, (14 LC 64,318) 165 F. 2d 970 (3rd Cir. 1948). To sustain appellants' contention would be to emasculate the arbitration provisions contained in the Collective Bargaining Agreement."

The United States Supreme Court has approvingly referred to this line of cases. "The reports of both Houses on that Act (Federal Arbitration Act) stress the need for avoiding the delay and expense of litigation, and practice under its terms raises hope for its usefulness both in controversies *based on statutes* or on standards otherwise created." *Wilko* v. *Swan* (1953), 346 U.S. 427, 431-432, 94 S. Ct. 182, 98 L. Ed. 168, 174. (Emphasis added.)

It is clear to me that if plaintiffs had brought this action in federal court subject to the Federal Arbitration Act, 29 USCA §3, proceedings would have been stayed pending arbitration. Here, defendant asks for dismissal of the suit because plaintiffs failed to exhaust the grievance procedures of the collective bargaining agreement.

Is the obligation to exhaust the internal remedies in a collective bargaining agreement modified when a judgment is sought on jurisdictional grounds in a state court? I have

found no United States Supreme Court decisions on this question involving statutory rights under the FLSA, but an action in a state court by an individual for severance pay claimed to be due under the terms of a collective bargaining agreement was dismissed for failure to exhaust grievance procedures. *Republic Steel Corp.* v. *Maddox* (1965), 379 U.S. 650, 653, 85 S. Ct. 614, 13 L. Ed. 2d 580, 583-584.

In his opinion Mr. Justice Harlan sets forth the reasons for the strong federal policy favoring arbitration as follows:

"But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the 'common law' of the plant. * * * Union interest in prosecuting employees grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

"A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation 'would inevitably exert a disruptive influence

upon both the negotiation and administration of collective agreements.' *Teamsters Local* v. *Lucas Flour Co.*, 369 U.S. 95. 103, 7 L. Ed. 2d 593, 599, 82 S. Ct. 571."

These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision. There is less reason to permit a lawsuit here than in *Maddox* where the claim was for severance pay, the plant was closed and no one held the position of foreman any longer with whom to initiate grievance procedures.

"Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on the contract.

I agree with the majority that *U.S. Bulk Carriers, Inc.* v. *Arguelles* (decided by the United States Supreme Court January 13, 1971) offers guidance on this question, but it guides me to the opposite result.

There a seaman brought an action in the federal district court for wages and a penalty alleged to be due under the provisions of 46 U.S.C. §596, which permits seamen to sue for wages in federal courts. The majority opinion (five justices) is based on statutory construction and reaches the conclusion that Congress in section 301(a) of the Labor Management Relations Act of 1947, 29 U.S. §185(a) did not intend to deprive seamen of a remedy they had had since 1790. The opinion held plaintiff could either sue in the federal courts or invoke the grievance procedures of the collective bargaining agreement.

Justice Harlan, one of the majority, concurred specially stating that the cases of *Smith* v. *Evening News Asso.* (1962), 371 U.S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246; *Republic Steel Corp.* v. *Maddox*, *supra*; and *Carey* v. *Westinghouse Corp.* (1964), 375 U.S. 261, 84 S. Ct. 401, 11 L. Ed. 2d 320, "evince the crucial role of the federal judiciary in forging the proper relationships among available arbitral, administrative, and

judicial forums for vindicating contractual and statutory rights of employers, unions, and employees. *In light of these cases, I cannot infer, from the mere provision by Congress of a federal judicial forum for enforcement of the wage claims of a subclass of workers' wages, that this Court is foreclosed from requiring arbitration under the collective-bargaining contract.*" (Emphasis added)

He makes the distinction between an individual's claim for wages based "simply on a contract" (*Maddox*) and a claim for wages growing out of a federal statute (*Arguelles* and the instant case) and states:

> "Where, however, the §301 dispute implicates federal statutory rights, it is incumbent upon this Court to fashion the relationships among forums according to an analysis of the policies underpinning both §301 and the federal statute the employee invokes, rather than simply transposing *ipso facto* the Court's labor arbitration jurisprudence."

He concluded:

> "And the difficulties of analyzing the respective boundaries of the contractual right and the statutory right forbode ill for the efficient resolution of disputes implicating both the contract right and the federal statutory right. But the matter is not one to be decided abstractly; it may well be that certain types of federal statutory benefits will lend themselves to arbitration or splitting without an unacceptable sacrifice in competing policy interests.
>
> "However, this is not such a statute, because the *very essence of the legislative policy at stake here is ensuring promptness in the payment of wages.* I think it obvious that the least desirable of all solutions would be to create a necessity for suits in both forums. In this circumstance, I think conflicting congressional policies are best reconciled by construing 46 U.S.C. §596 and §301 of

the Labor-Management Relations Act as securing to the seaman an option to choose between arbitral and judicial forums where he states a claim under both the contract and 46 U.S.C. §596." (Emphasis added.)

Justice White joined by Brennan, Stewart and Marshall, dissented stating: "In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957), it was held that federal courts have jurisdiction to specifically enforce the arbitration provisions of the collective-bargaining agreement. And it has been clear at least since *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965), that absent extraordinary circumstances not alleged here, contractual grievance procedures must be exhausted before suit can be brought."

On the distinction between contract and statutory rights he said: "nor until now has there been any principle which requires contract rights to be resolved internally but directs statutorily created remedies to be presented to the court, at least where, as here, the availability of the statutory remedy rests on disputed issues which are cognizable under the arbitration clause. In fact, this Court and lower federal courts have endorsed the suitability of arbitration to resolve federally created rights. In *Wilko* v. *Swan*, 346 U.S. 427 (1953), the Court expressed 'hope for (arbitration's) usefulness * * * in controversies based on statutes * * * *' 346 U.S. at 432. And circuit courts of appeal both before and after passage of §301 have required that FLSA employee's claims for liquidated damages under 29 U.S.C. §216(b) for failure to pay overtime wages be referred to contractual grievance procedures before being presented to the court."

In view of the federal cases, the position of the minority and Justice Harlan's concurring opinion in *Arguelles* and his generally favorable view toward arbitration, I believe the federal law to be that congressional policies are best reconciled by holding that actions for wages under the FLSA are under the general rule that contract grievance procedures

must be exhausted before an action can be brought in the courts. There is nothing in the majority opinion to indicate disagreement with this conclusion. The peculiar facts which persuaded the court Congress did not intend to take away a traditional remedy in *Arguellès* are not present in this case.

I would dismiss the action as having been brought prematurely.

MOORE, C.J., joins in this dissent.

Labor-Management Relations Act

June 23, 1947, c. 120, Title II, Section 203, 61 Stat. 153, 29 U.S.C. Section 173 (d).

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases. June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.

June 23, 1947, c. 120, Title III, Section 301, 61 Stat. 156, 29 U.S.C. Section 185 (a) et. seq.

§ 185. Suits by and against labor organizations—Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

United States Arbitration Act

Act of Feb. 12, 1925, c. 213, Section 3, 43 Stat. 883, codified July 30, 1947, c. 392, 61 Stat. 670, 9 U.S.C. Section 3.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.
July 30, 1947, c. 392, 61 Stat. 670.

Fair Labor Standards Act

29 U.S.C. Sec. 216, Section 16 (b) of the Act as amended.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

Some Sections of the Collective Bargaining Argeement

AGREEMENT BETWEEN IOWA BEEF PACKERS AND ASSOCIATED EMPLOYEES ORGANIZATION

ARTICLE III – PURPOSE OF AGREEMENT

SECTION 1: It is the intent and purpose of the parties hereto that this Agreement shall promote and improve the industrial and economic relationships between the Company, the Union and its members as set forth herein and to set forth herein rates of pay, hours of work, and other conditions of employment to be observed between the parties hereto.

SECTION 2: It is recognized by both parties that they have a mutual interest and obligation in maintaining friendly cooperation between the Company and the Union which will permit safe, economical and efficient operation of the plants.

ARTICLE VII – HOURS OF WORK

SECTION 3: Time and one-half (1½) will be paid for hours worked in excess of eight (8) in any day. Time and one-half (1½) will be paid for all hours worked in excess of forty (40) in any one week.

ARTICLE XIV – MEALS

SECTION 1: A lunch period shall be provided no later than five (5) hours from the start of an employee's shift, except when the shift does not exceed five and one-half (5-½) hours.

ARTICLE XX – GRIEVANCE PROCEDURE

SECTION 1: Should the Union or any individual employee desire to process a grievance pertaining to a violation of the Agreement, the matter shall be handled according to the following steps:

STEP I

The employee involved, with a Union representative if he so desires, shall discuss the matter with his immediate supervisor. In the event he does not receive a satisfactory

answer, he shall within Ten (10) days of the knowledge of the incident submit a written grievance to his immediate supervisor. The supervisor shall provide a written answer to the employee within seven (7) days.

STEP II

If the matter is not settled in the first step, the Union grievance committee or any officers designated by the Union shall present the matter to the Plant Superintendent for his decision. Grievances in this Step must be presented within five (5) working days after the answer in the First Step. At this point the grievance presentation shall be made in writing on the Employee's and steward's own time. Meetings shall be scheduled as near as possible to shift changes.

STEP III

If the matter is not settled in the second step, the Union grievance committee or any officer designated by the Union shall present the matter to the Plant Manager for his decision. Grievances in this step must be presented in writing within five (5) days after the answer at the second step. The Plant Manager shall have five (5) working days within which to give his answer in writing to the Union. Prior to submission to arbitration, the Union may request a further reasonable extension of time for the purpose of holding a meeting with the Vice President of Industrial Relations or his Designee in an effort to resolve the grievance.

SECTION 2: ARBITRATION PROVISION – If at the final step of the Grievance Procedure the matter is not satisfactorily adjusted, the grievance or dispute may be submitted to an impartial arbitrator to be selected by mutual agreement of the parties. A written request for arbitration shall be made within thirty (30) days of the Step 3 answer. If within fifteen (15) working days after receipt of such written request the parties are unable to agree upon an arbitrator, either party shall request a list or lists of names from the

Federal Mediation and Conciliation Service. The Union and the Company shall then alternately strike names until a single arbitrator is left. He will then be selected as the arbitrator for the arbitration in question. His decision in the grievance shall be final and binding on the parties, provided he shall not have authority other than to apply the terms and conditions specifically set forth in the Agreement. The arbitrator shall submit his decisions, in writing, within thirty (30) days after the conclusions of the hearing, or hearings as the case may be. The compensation and necessary expenses of the arbitrator shall be borne equally by the Company and the Union.

SECTION 3: The parties agree that the time allowed to process grievances is adequate. If the Union fails to process a grievance in the time specified herein, the grievance in question is ended. However, if either party requests a reasonable extension, the time limit specified for the discussion between the Plant Manager and representative of the Union, the time specified in Section 1 hereof shall be extended.

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IN THE

Supreme Court of the United States

October Term, 1970

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON
(and 13 other individuals),

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

RAUN, FRANCK & MUNDT
Counsel for Respondents
203 North Main Street
Denison, Iowa 51442

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1831

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA,

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA ON BEHALF OF IOWA BEEF PACKERS, INC.

Opinions Below

The opinion of the Supreme Court of Iowa (Pet. 8a-23a) is reported at 185 NW 2d 738. The findings and conclusions of the trial court (R. 40-46)[1] are not reported.

Jurisdiction

The judgment of the Iowa Supreme Court was entered on April 9, 1971. The petition for a writ of certiorari was filed on June 16, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

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[1] Record on appeal.

Question Presented

Whether the unqualified right of employees to sue under Section 16(b) of the Fair Labor Standards Act of 1938, as amended, to recover overtime compensation, liquidated damages and attorney's fees, as provided by the Act, must yield to the labor policy expressed in the Labor Management Relations Act of 1947 favoring binding arbitration of grievances under collective bargaining agreements.

Statutory Provisions

Section 16(b) of the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 29 U.S.C. 201 *et seq.*; Sections 203(d) and 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 153, 29 U.S.C. 173(d) and 185(a); and Section 3 of the United States Arbitration Act of 1925, 43 Stat. 883, 9 U.S.C. 1 *et seq.* are set forth at pp. 24a-26a of petitioner's brief.

Other relevant statutory provisions include Sections 15(a), 16(c) and 17 of the Fair Labor Standards Act; Sections 6 and 7 of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U.S.C. 251 *et seq.*; and Section 1 of the United States Arbitration Act of 1925. These provisions are set forth *infra*, appendix, pp. A-1 - A-6.

Statement

These consolidated actions were brought in the District Court of Iowa for Crawford County under Section 16(b) of the Fair Labor Standards Act by 14 named employees seeking to recover unpaid overtime compensation, liquidated damages and attorney's fees. The employees, all maintenance men at petitioner's meat processing plant during the two-year period involved in this action, were required to be "on call" during their lunch periods for emergency maintenance work and claimed petitioner had failed to compensate them in accordance with the overtime provisions of the Fair Labor Standards Act for hours worked over 40 in one week at one and one-half times the regular rate at which they were employed. Respondents, contrary to petitioner's statement (Pet. 4) asserted no

rights under the collective bargaining contract in effect at petitioner's plant.

In its answer, petitioner asked for dismissal of the complaint since the employees were subject to a collective bargaining agreement and had failed to proceed under its grievance procedures (Pet. 2-2a). Petitioner's motion to dismiss for such failure was denied by the trial court for the reason that "the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act of 1938 as amended cannot be restricted, abrogated or nullified by any agreement entered into by an employee and employer, or by employees with their employer, or by and through collective bargaining agreement entered into with the employer and the representative of the employees." (*ibid*)

The collective bargaining agreement between petitioner and the union, Associated Employees Organization, provides for a lunch period,[2] although not specifying its duration, and makes no provision for "on call" compensation (Pet. 27a). The contract also states that time and one-half will be paid for hours worked in excess of eight in any day, and in excess of 40 in any one week (*ibid*). The grievance procedure for violation of the agreement provides, inter alia, that the aggrieved employee must submit a written grievance to his immediate supervisor within 10 days of the knowledge of the incident and then, absent settlement, he must follow procedural steps upward through the management hierarchy – Plant Superintendent, Plant Manager, Vice President for Industrial Relations – to an arbitrator selected by both union and management from a panel provided by the Federal Mediation and Conciliation Service (Pet. 27a-29a). The arbitrator's authority is confined to applying the terms and conditions specifically set forth in the agreement (Pet. 29a). A time table is provided for each step, and Section 3 of the agreement states that "if the Union fails to process a grievance in the time

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[2] ARTICLE XIV - MEALS, Sectional: A lunch period shall be provided no later than five (5) hours from the start of an employee's shift except when the shift does not exceed five and one-half (5-½) hours.

specified herein, the grievance in question is ended." (*ibid*). The time limit is extended at either party's request only for step III. (*ibid*). The agreement also contains a "no strike" clause (Defendant's Exhibit A).[3]

The trial court found under the facts that the maintenance employees performed emergency repairs during their lunch periods and were on call for such work throughout the two year period and entitled to compensation (Pet. 3a-42, 10a). It entered judgment awarding the employees basic compensation and attorney's fees. It declined to award liquidated damages (Pet. 3a-4a).

The Supreme Court of Iowa affirmed the judgment, two justices dissenting. The majority held that the legal principle regarding compensable time under the Fair Labor Standards Act for being "on call" was settled by this Court's decision in *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and petitioner does not now challenge the correctness of this ruling (Pet. 4). Petitioner does challenge the majority holding that the specific Congressional intent manifest in the Fair Labor Standards Act "giving employees strong and detailed rights in court" outweighs "the general Congressional intent favoring arbitration" in the Labor Management Relations Act of 1947. The majority reasoned that the "broad Congressional policy" expressed in the Fair Labor Standards Act encompasses "more than simply wage relief for employees." It includes "broad economic considerations--improvement in commerce among the states" and "the remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of (its) broader objectives." (Pet. 14a).

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[3] ARTICLE VI - COMPANY AND UNION RESPONSIBILITIES, Section 1: During the term of this Agreement there shall be no strike, stoppage, slow-down or suspension of work on the part of the Union or its members or lock-out on the part of the Company. The Union further agrees that it will in no way interfere with the business of the Company by sanctioning or conducting a boycott on the handling of goods procured from a source or destined to a point where labor controversy may exist.

Argument

I. The decision of the majority of the Iowa Supreme Court is correct; it accords with principles well settled by decisions under the Fair Labor Standards Act of this Court and the majority of the courts of appeals. The decisions relied upon by petitioner and the dissenting justices are distinguishable both in law and fact.

While the issue as to whether employees' substantive rights under the Fair Labor Standards Act are arbitrable under agreements for binding arbitration has never been squarely presented to this Court, the decisions of this Court, since the enactment of the statute in 1938, rejecting any modification, by private or collective agreements, of these rights granted in the public interest, precludes any implication that the labor policies expressed in the Labor Management Relations Act require their determination in a private forum in accordance with the terms of the contract.

A. Contrary to petitioner's claim (Pet. 6), the employees here are not asserting rights under the collective bargaining agreement or breach of that agreement by petitioner. They are asserting rights under the Fair Labor Standards Act granted them by Congress as a means of achieving national compliance with the provisions of the statute.

The federal labor policy to be effectuated by Section 301(a) of the Labor Management Relations Act of 1947 is the promotion of industrial peace by statutory recognition of the collective agreement as a valid, binding and enforceable contract, and the agreement for arbitration of grievance disputes is "the *quid pro quo* for an agreement not to strike," *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 454-455 (1957) also, *Boys Markets* v. *Clerks Union*, 398 U.S. 235 (1970). On the other hand, the federal policy under the Fair Labor Standards Act, as enunciated by this Court in *U.S.* v. *Darby Lumber Co.*, 312 U.S. 100 (1941), is "to exclude from interstate commerce goods produced for commerce under conditions detrimental to the maintenance of minimum standards of living necessary

for health and general well being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced."

To achieve this objective, Congress made it unlawful in Section 15(a) of the Act for any person to transport, offer for transportation, ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of the minimum wage and overtime compensation provisions of the Act. (A-1). To effect compliance with the minimum wage and overtime provisions, Congress has provided a detailed enforcement scheme in Sections 16(a), 16(b), 16(c) and 17, (A-1, A-2, A-3; Pet. 26a) only a part of which confers a right on the individual employee to seek in court recovery of wages lost through violation, together with liquidated damages and attorney fees (Section 16(b)).

The private-public character of these rights under Section 16(b) was emphasized by this Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1946) where it said "(a)lthough this right to sue is compensatory, it is nevertheless an enforcement provision" (id. at p. 709). In *Brooklyn Savings Bank*, the employees had waived their claims for liquidated damages in a settlement with their employer and subsequently sued in court for their payment. In holding such a suit proper, this Court stated "(w)here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate," therefore, "(p)rohibition of waiver of claims for liquidated damages accords with the Congressional policy of uniformity in the application of the provisions of the act to all employers subject thereto, unless expressly exempted by the provisions of the Act" (id. at p. 710). There is no exemption provided for employers operating under collective bargaining agreement as petitioner suggests (Pet. 8).

The enforcement aspect of the employee's individual right to seek recovery of unpaid wages under the statute is further underscored by the Congressional amendment made to Section 16(b) in 1961[4] terminating the employee's right to sue under that section if the Secretary of Labor files a Section 17 action against the employer and seeks restraint of any further withholding of wages (Pet. 26a). The restitution of wages denied through the employer's violation, whether sought by the employee individually or by the Secretary of Labor was meant "to increase the effectiveness of the enforcement of the Act by depriving the violator of any gains accruing to him through his violation * * * and "to protect those employers who comply with the Act from having to compete unfavorably with employers who do not comply," *Wirtz* v. *Malthor, Inc.*, 391 F. 2d 1, 3 (9th Cir., 1968).

The stultifying effect upon the "Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto" (*Brooklyn Savings Bank* v. *O'Neil, supra*) by remitting the employees' Sec. 16(b) rights to the bargaining table for vindication is too readily obvious for extended discussion, particularly in the light of the fact that the Department of Labor has neither the staff nor the facilities to check two million establishments employing employees covered by the Act. *Hodgson* v. *Ricky Fashions*, 434 F. 2d 1261, 1263 n.2 (5th Cir., 1970). The competitive

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[4] In restoring full equity jurisdiction to the courts in a suit brought by the Secretary under Section 17 to include restraint of withholding of unpaid wages, the Congress noted that the enforcement provisions of the Act were not operating satisfactorily to protect the public interest. As stated by the Fifth Circuit in *Wirtz* v. *Jones*, 340 F. 2d 901, 903 (1965), "(w)ith the taking of necessary action left to the initiative of the employees themselves, enforcement was obviously exposed to employer and other pressures. The implications are plain from that part of the Senate Committee report which said: 'Very few of these suits have been brought by employees under section 16(b) of the act and of the few that have been brought most are initiated by individuals no longer in the employ of the defendant employer.' U.S. Code Cong. & Ad. News, 87th Congress, First Session, 1961, Vol. 2 at 1658."

advantage to employers of forcing through arbitration their employees' statutory rights under the label of contract rights is made forcefully clear by the facts of this case. No amount of circumlocution by petitioner disguises the fact that the employees' complaint asserted rights under the Fair Labor Standards Act and not under the collective bargaining agreement (Pet. 4, 5, 6, 7, 9, 11). It matters little that the statute makes no provision for a "work-free lunch-time." (Pet. 11) The statute provides that no employer shall employ any of his employees * * * for a workweek longer than forty hours unless such employee receives compensation for his employment in excess (thereof) at a rate not less than one and one-half times the regular rate at which he is employed (Section 7). Clearly if the employee works through every mealtime and still does not work over 40 hours per week, he is not entitled to time and one-half his regular rate under the statute. The employees in this instance sought compensation only for hours worked in excess of 40. The Act further provides (and the contract does not) as compensation for delay in payment of the statutory wage, an additional amount in liquidated damages (*Brooklyn Savings Bank v. O'Neil, supra*), unless the employer shows "'*to the satisfaction of the court*' that the act or omission * * * was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act; then the *court* may, in its sound discretion, award no liquidated damages" (Section 11, Portal-to-Portal Act of 1947) emphasis added. Although the trial court in this instance declined to order liquidated damages, the employees' rights to such an award can only be cut off by judicial determination, not by waiver under an employer-union agreement, *Brooklyn Savings Bank* v. *O'Neil*, supra; *D. A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946).

Furthermore, the grievance machinery under the contract between petitioner and the union is in its application inconsistent with the rights of the employees under the Fair Labor Standards Act and clearly repugnant to the Act. In the Portal-to-Portal Act of 1947[8] Congress enacted a statute of limita-

[8] In the Portal-to-Portal Act, Congress specifically legislated

tions barring actions on claims not commenced within two years after the cause of action accrued, and such actions are considered commenced on the day the complaint is filed in court (Sections 6 and 7) (App. A-4, A-5). The effects of dismissal of the instant suit, as sought by petitioner in the trial court, for failure to exhaust contract remedies, and remission to the grievance and arbitration procedure under the contract would be erosion of accrued back wages by operation of the statute while the employees' 16(b) claims slowly wended their way through the grievance machinery and arbitration. Resort to the grievance provisions in petitioner's agreement with the union (Pet. 28a-29a) graphically illustrates the number of weeks of accrued back wages which would be sacrificed to to this procedure.[6] Moreover, under the contract, the employees' claims would be completely foreclosed if the union fails to process a grievance within the time specified therein (Pet. 29a). The disruptive effect upon compliance with the Fair Labor Standards Act will not be mitigated by the availability of vacation, rehearing, modification or correction of the arbitrator's award under Sections 10 and 11 of the Arbitration Act if it is not in accordance with the provisions of the statute, as urged by petitioner citing *Evans* v. *Hudson*

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as to what is to be considered compensable time under the Fair Labor Standards Act. In making travel time and preliminary and postliminary activities noncompensable, unless such activities are made compensable by express provisions of written or nonwritten contracts or custom (§§ 4(a)(1)(2), 4(b)(1)(2), Senate Report No. 37, 80th Cong., 1st Sess., p. 45, specifically states "Any activity occurring during the scheduled workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act," and cited the example * * * "if a lunch period during the scheduled workday is compensable or not compensable under the provisions of the Fair Labor Standards Act, it will *continue to be compensable or not compensable according to that Act.*" (Emphasis added.)

[6] The Federal Mediation and Conciliation Service reports, that of the 722 cases sampled in 1970, the total time between request for a panel (of arbitrators for the parties to chose from) and the arbitration award was 164.2 days. "The FMCS and Arbitration: Problems and Prospects," April 1971 *Monthly Labor Review.*

Coal Co., 165 F. 2d 970 (3rd Cir. 1948).[7] Congress in enacting the Portal-to-Portal Act made no provision for tolling the statute upon motions for stays pending arbitration under the federal Arbitration Act, and vacation of an award as inconsistent with the Fair Labor Standards Act will not reinstate the accrued unpaid wages barred by the statute. Where, as here, the employer asks for an outright dismissal (Pet. 5) of the complaint, not for a stay pending arbitration, such a result is fore-ordained.

It is well settled under the Fair Labor Standards Act that the "results on the individual of the operations under the contract must be tested by the statute," *Bay Ridge Operating Co., Inc. v. Aaron*, 334 U.S. 446, 463 (1948); *149 Madison Ave. Corp. v. Asselta*, 331 U.S. 199 (1947); *Walling v. Harnischfeger Corp.*, 325 U.S. 427 (1945); *Walling v. Youngerman-Reynolds Co.*, 323 U.S. 37 (1944); *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 89 (1944); *Overnight Motor Transp. Co. v. Missel*, 318 U.S. 572 (1942) and a contract that has for its purpose, of which has the effect of circumventing or invading the command of the Act, is invalid and unenforceable, *Republican Pub. Co. v. American Newspaper Guild*, 172 F. 2d 934, 945 (1st Cir. 1946); *Torres v. American R. Co. of Porto Rico*, 157 F. 2d 255, 256 (1st Cir., 1946) cert. den. 329 U.S. 782; *Caserta v. Homes Lines Agency, Inc.*, 273 F. 2d 943, 946-947 (2nd Cir., 1959); *Mitchell v. Turner*, 286 F. 2d 104, 106 (5th

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[7] In *Evans v. Hudson Coal Co.* suit was brought before the enactment of the Portal-to-Portal Act by 19 workmen seeking to recover wages for both regular and overtime hours of work within the periods from October 24, 1938 to April 30, 1946. The state statute of limitations applicable to Fair Labor Standards claims before the passage of the Portal Act was six years in Pennsylvania. (House Report No. 71, p. 50, Senate Report No. 37, p. 49, 80th Cong., 1st Sess.). It is questionable that the Third Circuit would have similarly decided after the passage of the Portal Act. In any event *Evans v. Hudson Coal Co.*, and the Third Circuit's decisions in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (1943) and 160 F. 2d 661 (1947) and *Watkins v. Hudson Coal Co.*, 151 F. 2d 311 (1945) relied upon by the petitioner and dissenters are otherwise distinguishable and inapposite as discussed *infra*.

Cir., 1960); *Wood* v. *Meier*, 218 F. 2d 419, 420 (5th Cir., 1955); *Burry* v. *National Trailer Convoy, Inc.*, 338 F. 2d 442, 426 (6th Cir., 1964); *Fleming* v. *Warshawsky*, 123 F. 2d 622, 626 (7th Cir., 1941); *Kappler* v. *Republic Pictures Corp.*, 59 F. Supp. 112, 116 (S.D. Iowa, 1945), aff'd *Republic Pictures Corp.* v. *Kappler*, 151 F. 2d 543 (8th Cir., 1945), aff'd *per curiam* 327 U.S. 757 (1946); *Johnson* v. *Dierks Lumber & Coal Co.*, 130 F. 2d 115, 118 (8th Cir., 1942); *Robertson* v. *Alaska Juneau Gold Mining Co.*, 157 F. 2d 876, 879 (9th Cir., 1946), cert. den. 331 U.S. 823; *Handler* v. *Thrasher*, 191 F. 2d 120, 123 (10th Cir., 1951).

Under these principles there is little room for petitioner's argument that the various benefits derived by the employees from the collective bargaining agreement laid upon them a corresponding duty to submit their statutory rights under the Fair Labor Standards Act to binding arbitration under the terms provided by contract (Pet. 11) rather than to the court. Petitioner's repeated characterization of these statutory rights as contract rights in order to take shelter under this Court's decisions construing Section 301(a) of the Labor Management Relations Act, particularly *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, where concededly a contract right -- the right to severance pay -- was involved, only emphasizes petitioner's awareness that federal rights under another statute do not derive from collective bargaining and cannot be waived in private settlement of disputes.

The principles expressed in *Maddox*, applied to the facts in this case, illustrate the disruptive consequences which would flow from elevating the goal of industrial peace through the arbitral process over the goal of uniform compliance by employers with the Fair Labor Standards Act. Undeniably "conscientious handling of grievance claims (enhances) the union's prestige with employees" (*Maddox*, p. 653), yet the union in this case is powerless to press the employees' greater statutory rights under the terms of the contract any more than an arbitrator is authorized to award statutory remedies. (Pet. 29a) Undeniably "employer interests * * * are served by limiting the choice of remedies available to aggrieved em-

ployees," since the remedies under the contract are appreciably more advantageous monetarily to the employer than those under the statute, particularly as this Court in *Maddox* noted that "in the normal situation, * * * contract grievance procedures are (not) inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so," (at p. 653). The erosion of accrued back wages through the operation of the statute of limitations while the employees are futilely implementing the procedures effectuates neither the goal of industrial peace nor the legislative goals of the Fair Labor Standards Act.

The principles of this Court's decisions in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971) and *Wilko v. Swan*, 346 U.S. 427 (1953), apply *a fortiori* in this case. In both decisions, this Court carefully analyzed the impact which remission to arbitration would have upon the scope of substantive federal right to be protected, and emphasizing the limitations on the authority of an arbitrator to the express terms of the contract, (*Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597; compare Section 2: Arbitration Provision, under the contract in the instant case) the limited scope of judicial review of the arbitrator's determination, and decided against diminution of the right – in *Arguelles*, the seaman's right to prompt payment of wages, and in *Swan* the rights of securities investors against fraud – by compulsory submission of disputes involving these rights to arbitration. The rights of employees and complying employers under the Fair Labor Standards Act stand in no lesser need for the same protection.

B. Decisions of two courts of appeals favoring compulsory arbitration of wage claims under the Fair Labor Standards Act are distinguishable or no longer valid.

The Third Circuit's decisions in *Donahue v. Susquehanna Collieries Co.*, 138 F. 2d 3 (1943) and 160 F. 2d 661 (1947), *Watkins v. Hudson Coal Co.*,* 151 F. 2d 311 (1945), cert. den.

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*In *Watkins*, the Third Circuit was careful to point out that after the rights of the claimants have been determined as a matter of law

327 U.S. 777 (1946); and *Evans v. Hudson Coal Co.*, 165 F. 2d 970 (1948), relied upon by petitioner, the dissenting justices of the Iowa Supreme Court, and the dissenting justices in *Arguelles* as favoring arbitration of wage claims under the Fair Labor Standards Act, were premised on that court's interpretation of the United States Arbitration Act of 1925, providing for stays pending arbitration under agreements for arbitration of disputes arising out of contracts involving maritime transactions or commerce, but excluding contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce (App. A-6). It was the Third Circuit's view, as explained in its later decision in *Tenney Engineering v. United Electrial R. & M. Workers*, 207 F. 2d 450 (1953), that under the Arbitration Act, employees engaged in the manufacture of goods for commerce are not to be regarded as a "class of workers engaged in foreign or interstate commerce," within the exclusionary clause of Section 1 of the Arbitration Act, since, according to its interpretation of the legislative history of that Act, only transportation workers in the channels of commerce, such as seamen and railroad workers, were excluded from its provisions, and this was consistent with its earlier decisions in *Donahue v. Susquehanna Collieries, Inc.*, *Watkins v. Hudson Coal Co.*, and *Evans v. Hudson Coal Co.*, "in all of which the employees involved were engaged in the production of coal for later sale in interstate commerce" (at p. 453). Under the Third Circuit's rationale, seaman Arguelles' claim in *U.S. Bulk Carriers* would have been automatically excluded from the compulsory arbitration provisions of the United States Arbitration Act, so the coal cases offer small support to the dissenting opinion in *Arguelles* citing these decisions as favor-

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by the court, the problems of calculating how much each claimant is entitled to is properly referable either to a special master or an arbitrator. "We do not refer to arbitration the question of legality of the (wage) formula" the court stated, * * * "the right of time and one-half for overtime, plus liquidated damages for failing to get it, is an individual right of the employee, not a criminal sanction, nor even a general right given to an employee's bargaining unit." (at p. 315, 320).

ing arbitration of the seaman's wage claim, particularly since the Third Circuit stood alone in its view of the exclusionary clause of Section 1 of the Arbitration Act.[9]

The vitality of the Third Circuit's decisions in the coal cases as precedent should be measured against the subsequent enactment of the Portal-to-Portal Act and successive amendments to the Fair Labor Standards Act which specifically define areas where collective agreements may vary the express provisions of the Act. In the Portal-to-Portal legislation, the Congress left to agreement or custom the matter of compensable travel time and preliminary and postliminary activities, but decreed that "activities during the scheduled workday will continue to be compensable or not compensable in accordance with the existing provisions of the Fair Labor Standards Act," (supra p. 7, Fn 5). To this extent, the Ninth Circuit's decision in *Beckley* v. *Teyssier*, 332 F. 2d 495 (1964) can be reconciled with Congressional intent that compensation for travel time, to and from San Clemente Island where they were employed by the carpenters involved in that case, is a contractual right governing compensation for such activities, since such travel time was specifically made non-compensable by the Portal-to-Portal Act.

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[9]Contrary to the Third Circuit's view of the effect of the exclusionary clause in the federal Arbitration Act, the Sixth Circuit in *Gatliff Coal Co.* v. *Cox*, 142 F. 2d 876 (1944), a Fair Labor Standards case; the Fourth Circuit in *International Union* v. *Colonial Hardwood Floor Co.*, 168 F. 2d 33 (1948); *United Electrial R. & M. Workers* v. *Miller Metal Products*, 215 F. 2d 221 (1954); the Fifth Circuit in *Lincoln Mills of Ala.* v. *Textile Workers Union*, 230 F. 2d 81 (1956); the Seventh Circuit in *United Steelworkers* v. *Galland-Henning Mfg. Co.*, 241 F. 2d 323 (1957); and the Tenth Circuit in *Mercury Oil Refining Co.* v. *Oil Workers Int. Union, CIO*, 187 F. 2d 980 (1950) were of the opinion that the exclusionary clause in Section 1 included all contracts of employment in commerce and production of goods for commerce. This Court in reversing the Fifth Circuit's decision in *Lincoln Mills* that the district court had no jurisdiction under Section 301(a) of the LMRA to order compliance with grievance arbitration provisions, did not allude to the Fifth Circuit's discussion of the federal Arbitration Act at all, and Justice Frankfurter's dissenting opinion finds rejection, "though

Section 7 of the Fair Labor Standards Act makes mandatory the payment of overtime compensation by its very terms – "*Except as otherwise provided* in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce for in the production of goods for commerce, or is employed in an enterprise engaged in commerce or the production of goods for commerce, for a workweek longer than forty hours unless such employee received compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." Exceptions to this command are explicitly spelled out in the Act, and where collective bargaining agreements – which observe and minimum wage and overtime provisions of the Act – relieve the employer of violations of Section 7, those provisions are specifically spelled out, i.e. §§ 7(b)(1)(2); 7(e) (7) and 7(f). Absence of specific prohibitions against arbitration of Fair Labor Standards claims does not, as viewed by the dissenting justices of the Iowa Supreme Court, leave to the parties to agree "between themselves how these rights shall be enforced." (Pet. 17a). Where Congress meant collective bargaining agreements to vary the mandatory provisions of the Act, it knew how to say so. If it intended to leave enforcement of the Act's provisions to the employer, union and arbitrators these carefully drawn references to collective agreements would have been superfluous. Wholesale exemption from compliance with the Fair Labor Standards Act of employers operating under collective bargaining agreements with binding arbitration clauses was clearly not within the intendment of Congress.

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not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion." *Textile Workers* v. *Lincoln Mills*, 353 U.S. at p. 466.

CONCLUSION

The decisions of the District Court of Iowa for Crawford County and the majority of Iowa Supreme Court are correct. The petition for writ of certiorari should be denied.

Respectfully submitted,

RAUN, FRANCK & MUNDT
Counsel for Respondents
203 North Main Street
Denison, Iowa 51442

(APPENDIX)

Fair Labor Standards Act

FAIR LABOR STANDARDS ACT OF 1948, AS AMENDED, 52 Stat. 1060, as amended, 29 U.S.C 201, et seq.

SEC. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Secretary of Labor[81] issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of the Act, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;[82]

SEC. 16. (c) The Secretary of Labor[83] is authorized to supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under section 6 or section 7 of this Act, and the agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have under subsection (b) of this section to such unpaid minimum wages or unpaid overtime compensation and

an additional equal amount as liquidated damages. When a written request is filed by any employee with the secretary claiming unpaid minimum wages or unpaid overtime compensation under section 6 or section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: *Provided*, That this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding initiated or brought by the Secretary if it does involve any issue of law not so finally settled. The consent of any employee to the bringing of any such action by the Secretary, unless such action is dismissed without prejudice on motion of the Secretary, shall constitute a waiver by such employee of any right of action he may have under subsection (b) of this section for such unpaid minimum wages or unpaid overtime compensation and an additional equal amount as liquidated damages. Any sums thus recovered by the Secretary on behalf of an employee pursuant to this subsection shall be held in a special deposit account and shall be paid, on order of the Secretary, directly to the employee or employees affected. Any such sums not paid to an employee because of inability to do so within a period of three years shall be covered into the Treasury of the United States as miscellaneous receipts. In determining when an action is commenced by the Secretary under this subsection for the purposes of the *statutes*[90] of limitations provided in section 6(a) of the Portal-to-Portal Act of 1947, it shall be considered to be commenced in the case of any individual claimant on the date when the complaint is filed if he is specifically named as a party plaintiff in the complaint, or if his name did not so appear, on the subsequent date on which his name is added as a party plaintiff in such action.[91]

SEC. 17. The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).[93]

Relation to Other Laws

Portal-to-Portal Act

PORTAL-TO-PORTAL ACT OF 1947, 61 Stat. 84, 29 U.S.C. 251, et seq.

SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, *except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;*[1]

* * * * * * *

SEC. 7. DETERMINATION OF COMMENCEMENT OF FUTURE ACTIONS.—In determining when an action is commenced for the purposes of section 6, an action commenced on or after the date of the enactment of this Act under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, shall be considered to be commenced on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act of 1938, as amended, or the Bacon-Davis Act, it shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed in the court in which the action was commenced.

* * * * * * *

United States Arbitration Act

United States Arbitration Act of 1925 (43 Stat. 883, 9 U.S.C. § 1 *et seq.*)

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (July 30, 1947, ch. 392, 61 Stat. 670)

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~~No. 1631~~

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IN THE

Supreme Court of the United States

October Term, 1970

IOWA BEEF PACKERS, INC.,

Petitioner

v.

EDWARD D. THOMPSON
(and 13 other individuals),

Respondents.

REPLY BRIEF FOR PETITIONER ON PETITION FOR WRIT OF CERTIORARI

LOUIS S. GOLDBERG
Counsel for Petitioner
300 Commerce Building
Sioux City, Iowa, 51101

P. L. NYMANN
Co-Counsel for Petitioner
P. O. Box 515
Dakota City, Nebraska, 68731

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IN THE

Supreme Court of the United States

October Term, 1970

No. 1831

IOWA BEEF PACKERS, INC.,

Petitioner,

v.

EDWARD D. THOMPSON, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

REPLY BRIEF FOR IOWA BEEF PACKERS, INC.

I

The crucial issue here is *a policy* determination in harmony with the procedures formulated by this Court in a national labor relations policy. That issue is largely submerged in the Respondents' Brief.

Respondents' Brief (p. 12) leans heavily on *Wilko v. Swan*, 346 U.S. 427 (1953) and on the Steelworkers trilogy. That reliance is misplaced. Witness these statements by Mr. Justice Douglas in *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), following his brief review of *Textile Workers v. Lincoln Mills*, 353 U.S. 448 and Section 301 (a) of the Labor Management Relations Act:

> Thus the run of arbitration cases, illustrated by *Wilko v. Swan* became irrelevant to our problem. (p. 578).

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail . . . (p. 584, 585).

And in the dissenting opinion in *Wilko v. Swan*, Mr. Justice Frankfurter wrote:

> Arbitrators may not disregard the law. Specifically they are, as Chief Judge Swan pointed out, "bound to decide in accordance with the provisions of section 12(2)." *On this we are all agreed.* (Our emphasis). (p. 440 of 346 U.S.)

That was a Securities Act case. So, here, in accordance with the Fair Labor Standards Act. And in *Republic Steel Corporation v. Maddox*, 379 U.S. 650 at 659 (1965) Mr. Justice Harlan stated: "Any such doubts must be resolved" in favor of arbitration.

To like effect, favoring arbitration and the supremacy of L M R A Section 301, see *Vaca v. Sipes*, 386 U.S. 171 (1967), at 184 (citing *Maddox)* and at 191; *Boys Markets v. Union*, 398 U.S. 235 (1970); and the opinions by Mr. Justice Harlan in June, 1971, in *Amalgamated Association v. [redacted]ckridge*, _____ U.S. _____, 29 L.Ed 2d 473 at 484, and in *Bivens v. Six Unknown Agents*, _____ U.S. _____, 29 L.Ed 2d 619 at 631 (citing *Lincoln Mills*).

II

> Respondents' Brief misconceives the nature and extent of employees' rights under the Fair Labor Standards Act (FLSA).

Nothing in Petitioner's position or in our Brief runs counter to the decisions of this Court under FLSA. We do not claim waiver or compromise or exemption or anything else in defiance of substantive rights under FLSA. Indeed, we assert the arbitrator's *duty* to apply the FLSA provisions. See also Division I of this Reply Brief.

Respondents beg the "Question Presented" (their Brief, p. 2) by assuming "the unqualified right of employees to sue". Actually, that right is rigidly qualified in law under FLSA and is seriously restricted in practice and in fact, as their own Brief testifies (pp. 6 and 7 and note 4); unlike the Seamen's Act in *Arguelles*, (which made no provision for administrative enforcement), the Secretary of Labor takes over the whole of FLSA enforcement except for the *"Very few of these suits"* brought by employees (n. 4). (Our emphasis).

Given a Collective Bargaining Agreement (which affords rates of pay far in excess of those required by FLSA), the very opinions of this Court cited by Respondents distinguish our case. In *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1946), this Court said that the legislative history of FLSA "shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages *** due to the unequal bargaining power as between employer and employee . . ."; so, too, in *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946).

Moreover, except for the small minimum wage guaranteed, the courts recognize that FLSA actions are actions on contract. *Republic Pictures Corp. v. Kappler* (cited by Respondents, Brief p. 11), 151 F.2d 543, aff'd per curiam 327 U.S. 757 (1946) states:

> The action for overtime under the statute is an action on contract; at least, the Federal statute is bottomed upon a contract of employment. As said in *Northwestern Yeast Co. v. Broutin*, 6 Cir., 133 F.2d 628, "The Federal statute is premised upon the existence of an employment contract **** The action for double compensation may be considered as debt or as an action for wages due under the employment agreement."

III

Respondents' rights rest *simply* on the Collective Bargaining Agreement; those rights (work-free lunchtime) are *not* found in FLSA.

Respondents' Brief (p. 8, lines 7 and 8) concedes, as it must, that "the statute (FLSA) makes no provision for a 'work-free lunch-time'." Thus, in effect, Respondents concede our Petition, though they assert "It matters little." We say it matters much; it is the key to this case. The contract, and only the contract, awards the right.

Also, Respondents will recall and will not deny that the "Findings" by the Trial Court in this case (Iowa Supreme Court "Record", p. 44, lines 12-16) included this:

> It appears to the court that this is a matter that could and should be taken care of under the terms of the contract of employment of the company with the union and its members.

IV

Respondents' Brief misconceives the application of the U. S. Arbitration Act of 1925.

Respondents' Brief (pp. 12-15) devotes much space to the United States Arbitration Act of 1925, in an effort to distinguish the four United States Circuit Courts of Appeals FLSA cases on which we rely.

In reply, it should suffice to refer to our quotation, in Division I of this Brief, from Mr. Justice Douglas in *Lincoln Mills* that "the run of arbitration cases **** become irrelevant to our problem." In view of the supremacy of L M R A section 301, as interpreted by this Court, the Arbitration Act becomes secondary for these purposes.

Our references, in our Petition, to the Arbitration Act were designed to demonstrate that Congressional concern in favor of arbitration dates back at least to 1925, thus antedating the 1938 FLSA by some 13 years.

CONCLUSION

For the reasons stated in our Petition and in this Reply Brief, we respectfully submit, our petition for a writ of certiorari should be granted.

Respectfully submitted,

LOUIS S. GOLDBERG
Counsel for the Petitioner
300 Commerce Building
Sioux City, Iowa, 51101

P. L. NYMANN
Co-Counsel for the Petitioner
P. O. Box 515
Dakota City, Nebraska, 68731

September 1, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-286

IOWA BEEF PACKERS, INC., *Petitioner,*

v.

EDWARD D. THOMPSON, *et al., Respondents.*

On Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR THE PETITIONER

LOUIS S. GOLDBERG
Counsel for Petitioner
300 Commerce Building
Sioux City, Iowa 51101

P. L. NYMANN
Co-Counsel for Petitioner
P. O. Box 515
Dakota City, Nebraska 68731

LOUIS S. GOLDBERG
and
P. L. NYMANN
On the Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-286

IOWA BEEF PACKERS, INC., *Petitioner,*

v.

EDWARD D. THOMPSON, JAY NOLLEN, KENNETH A. HARDER, DONALD J. SPORRER, LAWRENCE W. KENNEDY, ALBERT WEAVER, JAMES R. MORGAN, VAL JEAN JOHANNSEN, RAYMOND JAMES JOHNSON, LUVERNE M. HOFFMAN, CAROL W. VENNINK, BEN J. LACKMAN, LARRY JAMES LARRISON, LAWRENCE J. KABELA, *Respondents.*

On Writ of Certiorari to the Supreme Court of Iowa

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The trial court's ruling, denying petitioner's Motion for Separate Adjudication of Law Points (that is, to dismiss for respondents' failure to invoke the grievance procedures of the collective bargaining agreement), on March 5, 1968 is printed in the single Appendix, A.7.

The Final Judgment and Decree by the trial court, filed October 20, 1969 is printed in the Appendix, A.9. The Opinions of the Supreme Court of Iowa, filed April 9, 1971 are reported at 185 N.W. 2d 738 and are printed in the Appendix, A.13 and A.20.

JURISDICTION

The Opinions (majority and dissenting) of the Supreme Court of Iowa are dated and were entered on April 9, 1971. The Clerk of that Court informs counsel for petitioner that entry of Judgment in that Court must be deferred as there is on file the Stay Order dated April 29, 1971; the full text of that Order is printed in Appendix, A.12. The statutory provision believed to confer on this court jurisdiction to review that judgment by writ of certiorari is 28 U.S.C. 1257 (3); and counsel believes the applicable rule of this Court is Rule 19 (1) (a). Petition for writ of certiorari was filed June 16, 1971 and granted October 12, 1971.

STATUTES

Labor Management Relations Act, 1947 (LMRA) Section 203 (d), 61 Stat. 153, Section 301 (a) 61 Stat. 156, 29 U.S.C. Section 173 (d) and 185 (a) (printed as Supplement A at the end of this brief).

United States Arbitration Act, originally enacted by Act of February 12, 1925, c. 213, 1-15, 43 Stat. 883-886, codified in 1947 into Title 9, U.S.C., now 9 U.S.C. Section 3 (printed as Supplement B at the end of this brief).

Fair Labor Standards Act (FLSA), Act of 1938 as amended, now 29 U.S.C. 201-219, Section 16 (b) (printed as Supplement C at the end of this brief).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the prevailing opinion in the Supreme Court of Iowa erroneously read or erroneously applied the rule of the prevailing opinion in *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351, 27 L. Ed. 2d 456, 91 S. Ct. 409 (January 13, 1971); and whether it should have applied *Republic Steel Corporation* v. *Maddox,* (1965), 379 U.S. 650.

2. Is an employee, whose employment is in commerce or affects commerce, required to attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress, where, as here, his grievance arises from a right given the employee simply by that contract (a right to work-free mealtime) (and the breach of that right by the employer); or may the employee completely by-pass those grievance procedures and sue at once under Section 16 (b) of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201-219 (which act makes no provision for work-free mealtime)?

3. Where, as here, the Collective Bargaining Agreement awards the employee a regular rate of pay and overtime pay (and many "fringe" benefits) materially better than the minimum requirements of FLSA, may the employee who shares the benefits of that contract reject the contract obligation of grievance procedure as his remedy and seek, instead, the generalized remedy of action under FLSA?

4. Whether to permit a choice of remedies, between arbitration or suit, would tend to frustrate or erode the policy of Congress and this Court to fashion a body of arbitration law in implementing national labor rela-

tions policy, where, as here, the claim is simply for contract overtime pay for the employer's failure to honor a contract agreement to allow a work-free meal period.

5. Whether the Supreme Court of Iowa, in Division II of its prevailing Opinion (we do not here challenge its Division I), erred in sustaining the Ruling of the Trial Court rejecting petitioner's motion to require utilizing the contract grievance procedures.

STATEMENT OF THE CASE

The 14 plaintiffs (respondents here), each for himself, brought 14 separate actions, by the same law firm, in the District Court of Crawford County, Iowa, against petitioner, claiming overtime pay, liquidated damages, attorney fees and costs under the Fair Labor Standards Act. The case was tried by ordinary proceedings without a jury. Not until the trial were the 14 cases consolidated; they were also consolidated for appeal to the Supreme Court of Iowa (Iowa's highest court) (Appendix, A.11.).

All respondents were employed by petitioner in employment in interstate commerce or affecting commerce. Petitioner is engaged in the processing of meat and its distribution and sale throughout the United States. All respondents were employed in the maintenance department, their duties being chiefly to maintain and repair plant machinery and equipment used by petitioner in the processing of meat.

Respondents' employment was governed by the Collective Bargaining Agreement effective from and after February 12, 1965, made between petitioner and Associated Employees Organization ("the Union"). In that contract, Article XIV provides for a "lunch

period" (Appendix, A.29.); it is agreed that the period was to be of 30 minutes' duration.

The respondents, in their action at law, asserted that during the period of two years preceding the filing of their actions (13 filed on April 21, 1967, and one on Dec. 12, 1967) they were, in effect, denied their contract right of a 30-minute work-free meal period, in that they were required to be "on call" during their lunch period, each work day. Accordingly, each claimed to be entitled to pay at the contract overtime rate for each such half-hour during the period of two years. The Trial Court found these facts in favor of respondents (Appendix, A.9); these findings were affirmed by Division I of the prevailing Opinion of the Supreme Court of Iowa (Appendix, A.15); while petitioner does not concur in the correctness of those findings, we do not here challenge them.

However, petitioner did challenge, by Answer (A.4) and by Motion (A.6) in each of the 14 cases (both in the Trial Court and in the Supreme Court of Iowa), all of the actions as premature because all respondents (by their own admission) *failed to attempt to exercise the grievance procedures contracted for in the Collective Bargaining Agreement.* The Trial Court overruled petitioner's Motion (Appendix, A.7); the Supreme Court of Iowa, in Division II of its prevailing Opinion, affirmed (Appendix, A.17); hence the Petition for a Writ of Certiorari.

The Collective Bargaining Agreement in its Article III (Appendix, A.28) states the "intent and purpose of the parties" to be to "promote and improve the industrial and economic relationships between the Company, the Union and its members . . ."

Article VII of that Agreement (Appendix, A.29) deals with "Hours of Work" and provides for time and one-half (1½) to be paid for hours worked in excess of 8 in any day (and in excess of 40 hours in any one week).

Article XX—"Grievance Procedure" (Appendix, A.29) provides for "the Union or any individual employee" a grievance procedure in 3 steps, concluding with binding arbitration provisions.

Respondents' substantive claims rest solely and simply on the contract provision for work-free meal-time and the petitioner's alleged breach of that commitment. The Fair Labor Standards Act contains no provision for meal-time. Respondents have availed themselves of all the benefits of the Collective Bargaining Agreement (benefits that are materially greater than those required by FLSA); but, admittedly, respondents *refused to fulfill their contract obligation to attempt grievance procedures and arbitration as their remedy.*

SUMMARY OF THE ARGUMENT

An employee who asserts a substantive right arising from a Collective Bargaining Agreement must, for remedy, *attempt* to utilize the grievance and arbitration provision of that Agreement. Here, by their own admission, the employees made no such attempt. They may not proceed directly to court action under the Fair Labor Standards Act.

The central issue is that there be no reversal, frustration, or erosion of the Congressional policy declared in the 1947 LMRA and the endeavors of this

Court seeking to formulate harmonious procedures in a national labor relations policy.

Our view is supported by:

(a) Congressional policy declared in the Labor-Management Relations Act, 1947;

(b) The decisions of this Court in a national labor relations policy, with special reference to *Republic Steel Corporation* v. *Maddox,* (1965), 379 U.S. 650.

(c) Four decisions of United States Courts of Appeals in Fair Labor Standards Act cases (cited hereinafter).

(d) The dissenting opinion of the Supreme Court of Iowa in the present case; and

(e) The dissenting opinion in *U.S. Bulk Carriers, Inc.* v. *Arguelles,* (1971), 400 U.S. 351.

Nor do the prevailing opinions in *Arguelles* and in this case stand in the way. The Iowa majority rests almost wholly on *Arguelles. Arguelles* is distinguishable on the facts and on the law. Here, the substantive right arose simply from the contract (as in *Maddox*); in *Arguelles,* the right arose solely from the statute. Here, the FLSA is a broadly generalized statute; in *Arguelles,* the statute is exceptional and distinctly specialized and restricted, to protect the traditional national policy, centuries old, shielding wards of the Admiralty.

These considerations become especially persuasive in view of the nature of the right asserted by re-

spondents. That right is for a work-free (not subject to call) lunch period; that right is granted by the Collective Bargaining Agreement; the statute (FLSA) makes no provision for a work-free lunch-time.

Maddox, not *Arguelles,* applies here.

ARGUMENT

POINT I

The Crucial Issue Is That There Be No Reversal, Frustration, or Erosion of the Congressional Policy Declared in the 1947 LMRA and the Endeavors of This Court Seeking To Formulate Harmonious Procedures in a National Labor Relations Policy.

Congress has expressly approved contract grievance procedures as "the desirable method" for settling disputes in labor relations. LMRA Section 203 (d), 29 U.S.C. Section 173 (d) (1947) (set out as Supplement A at the end of this brief).

In 1957, this Court, in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, concluded to compel arbitration (requested by the union and refused by the employer). In an opinion by Mr. Justice Douglas, this Court (with only Mr. Justice Frankfurter dissenting) adopted Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. Section 185, as a charter authorizing "federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." (p. 451). Furthermore, this Court ruled: "The congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes being clear, there is no reason to submit them

to the requirements of Section 7 of the Norris-LaGuardia Act. (pp. 458-459).

Lincoln Mills was a suit by a union; the opinion reserved the question of the rights of individual employees. That question was resolved in *Republic Steel Corporation* v. *Maddox* (1965), 379 U.S. 650, which we believe controls our case. This Court reversed a money judgment awarded Maddox by the State courts. Maddox claimed severance pay under a collective bargaining agreement. That agreement, as here, contained a three-step grievance procedure, to be followed by binding arbitration; Maddox made no effort to utilize that mode of redress. In an opinion by Mr. Justice Harlan (with only Mr. Justice Black dissenting), this Court said:

> "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress." (Emphasis in original) (p. 652).

And, at page 657:

> "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of Lincoln Mills," and "the subject matter of section 301 (a) 'is peculiarly one that calls for uniform law.'" Local 174, Teamsters etc. v. Lucas Flour Co., 369 U.S., at 103.

In our case, the respondents admit that they did not attempt to utilize the contract grievance procedures.

In the development of a national labor relations policy, the principles of *Lincoln Mills* and of *Maddox*

have been implemented in many decisions of this Court.[1] The sole exception (based on its special facts and its special statute) appears to be *U. S. Bulk Carriers* v. *Arguelles*, (1971), 400 U.S. 351, to be discussed *infra*.

POINT II

The Rule of Maddox, Not the Rule of Arguelles, Applies Here, Thus Requiring the Respondents To Attempt To Utilize the Grievance and Arbitration Provisions of Their Collective Bargaining Agreement, Rather Than Proceeding Directly to Court Action Under the Fair Labor Standards Act.

As stated in our Summary, supra, the right asserted by respondents is a work-free lunch-time; that right is granted by the Collective Bargaining Agreement; the statute (FLSA) makes no provision for a work-free lunch-time.

The prevailing Opinion below (it states "the question is close") accords priority to court action under

---

[1] See the *Steelworkers* trilogy, (1960), 363 U.S. 564, 363 U.S. 574, and 363 U.S. 593; *John Wiley & Sons, Inc.* v. *Livingston*, (1964), 376 U.S. 556-559; *Vaca* v. *Sipes*, (1967), 386 U.S. 171; *The Boys Markets, Inc.* v. *Retail Clerks' Union*, (1970), 398 U.S. 235. Note also *Bivens* v. *Six Unknown Agents*, (June 21, 1971), — U.S. —, 29 L. Ed. 2d. 619 at 631 (citing the Lincoln Mills principle in a federal narcotics unlawful search case); and *Amalgamated Association* v. *Lockridge*, (June 14, 1971), — U.S. —, 29 L. Ed. 2d. 473 at 484, (ruling that the employee's claim against his union should have been directed to the National Labor Relations Board, not to the State court). Significant, too, is the decision of NLRB in *Collyer* v. *Local Union*, (August 20, 1971), 192 NLRB No. 150, Case No. 1-CA-6916, 1971 CCH NLRB Decisions, Para. #23,385 (deferring Board jurisdiction in favor of the arbitration provision, for an alleged violation of Section 8 (a) (5), expressly implementing this Court's "national policy" under Section 301 of the LMRA, citing the *Steelworkers* trilogy, *supra*, *Lincoln Mills*, and *Boys Markets*).

the Fair Labor Standards Act as against grievance procedure and arbitration. In doing so, that Opinion rests largely, if not wholly, on the prevailing Opinion of this Court in *U. S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 27 L. Ed. 2d 456, 91 S. Ct. 409, decided January 13, 1971. With all deference to the Iowa Opinion, we believe that *Arguelles* does not warrant the Iowa conclusion in our case; with all respect, we believe the Iowa prevailing Opinion reads *Arguelles* erroneously or applies it erroneously.

Opposed to that Iowa Opinion are these: Four decisions of United States Courts of Appeals, cited in the Iowa opinion itself, ruling "In accordance with this general rule," . . . "that employees must attempt to arbitrate FLSA claims before they can come to court."; the Iowa dissenting Opinion in our case, discussing, inter alia, the same four Courts of Appeal decisions; the dissenting Opinion in *Arguelles* in this Court; and we believe the considerations stated by Mr. Justice Harlan in his concurring opinion in *Arguelles* may tend to support our view in favor of requiring that utilization of grievance procedures should apply in our case. We shall return to these later, herein.

Arguelles Distinguished:

We begin by indicating material differences in the facts and in the law, distinguishing *Arguelles*. The substantive claims of respondents here rest entirely and simply on the Collective Bargaining Agreement. That contract, Article XIV (Appendix A.29) (*not* FLSA) commits the Company to allow its employees one-half hour of work-free meal time; for any breach of that obligation, the company (petitioner) must pay as for time worked, at the overtime rates stipulated in

the contract; and those rates are materially higher than the FLSA minimum provisions. By contrast, in *Arguelles, his* Brief (page 15) asserted that "the wellspring of his right is not the collective bargaining agreement, but the text of the statutes and the court's interpretation of them." Here, the Iowa prevailing opinion itself recites: "Under the contract between the union and defendant, the men were supposed to have a thirty-minute lunch period." (Appendix, A.14, third paragraph).

On the law side, there is sharp distinction, too. In *Arguelles,* the statute imposed the civil penalty, irrespective of any improper shortage, as a weapon to enforce prompt payment of seamen's wages; the statute was traced as far back as 1790; it evidenced the continuing traditional policy of our government in solicitude for the protection of seamen as wards of admiralty; it singled out a special sub-class of employees for special and different treatment. All this is stressed throughout the briefs and prevailing opinion in this Court. And the statute in *Arguelles* makes no provision for administrative enforcement.

Not so, the FLSA; the FLSA is written in broad, generalized strokes, suited to a wide variety of circumstances and of needs; like the LMRA, the FLSA is open to all employees engaged in commerce or in activities affecting commerce; it is one of a set of Acts serving to formulate national labor policy, all of relatively recent vintage; indeed, FLSA was enacted a decade later than the United States Arbitration Act of 1925. Moreover, FLSA contains so many administrative provisions and such extensive authority to the Wage and Hour Administrator for court actions, including injunctive relief, that there is need in FLSA

to make clear that action in court is available to the individual employee who is not shielded by a Collective Bargaining Agreement and a Union.

Indeed, in the typical FLSA case, there is no substantive contract right; there is no breach; the wrong consists of violation of the statute; there could be no remedy if the statute did not provide a remedy by administrative enforcement or by action in court. Actually, the administrative procedures are so efficient that only a minor fraction of cases get into the court.

Grievance Procedures a Better Remedy:

The case at bar demonstrates rather neatly that, given a Collective Bargaining Agreement, the grievance procedures and arbitration provide a remedy superior to individual action in court. Here we have 14 respondents, with 14 separate lawsuits (apparently so deemed advantageous by the one firm of lawyers who acted for all fourteen), with 14 separate sets of pleadings and motions, finally consolidated for trial and appeal. A single, simple grievance claim under the Agreement would have sufficed. It is interesting to note that the court did not award "liquidated damages" to any of the claimants. Except for the issue as to failure to attempt grievance procedures, all the questions in the 14 cases were purely factual, singularly suited to arbitration by persons well versed in the industry: (a) Were the employees subject to call during their supposedly work-free meal-time? (b) How much is due each? Also, implicit in all four United States Courts of Appeals FLSA cases cited in both of the opinions of the Supreme Court of Iowa, is the point that the arbitrators can and will apply the

relief provisions of FLSA; and in *Evans* v. *Hudson Coal Co.* (1948), CA-3, 165 F. 2d 970, the court is explicit: "But if the arbitration process proceeds to an award which is not in accordance with the provisions of the Fair Labor Standards Act or any other applicable statute, Sections 10 and 11 of the Arbitration Act provide means for its vacation, rehearing, modification or correction."

NLRB in its footnote 17 in its *Collyer* case cited in our footnote 1, states: (17) "As Member Jenkins points out, the arbitral process, like any other, is not without its imperfections. But the fact that some 95 percent of collective agreements currently look to arbitration as the means of resolving disputes which the parties are unable to resolve in the course of their grievance discussions, demonstrates both the accuracy of the Supreme Court's characterization and the continuing vitality of arbitration. Its successes suggest that we are here respecting substance and not mere 'mystique.'"

It may not be amiss to observe here that, unlike so many court cases under FLSA, petitioner was not charged with substandard wage rates, either as regular rates of pay or as overtime, wrongs which FLSA is especially designed to remedy. Quite the contrary: under the Collective Bargaining Agreement the respondents enjoy rates of pay, both regular and overtime, at substantially twice the level commanded by FLSA (to say nothing of such significant "fringe" benefits as profit-sharing, a guarantee of 40 hours of pay each week, vacation pay, rest periods on company time, insurance benefits at no cost to employees, etc.). Enjoying these superior advantages all derived from

the Collective Bargaining Agreement, the respondents admittedly elected to refuse to respect their obligations for grievance procedure and arbitration under that Agreement.

Discussion of the Iowa Opinions:

The prevailing Iowa opinion states (Appendix A.18, last paragraph): "The Fair Labor Standards Act too antedates the Labor Management Relations Act." Literally, that may be a correct statement. However, the United States Arbitration Act dates from 1925; in 1947 Section 301 of LMRA brought the arbitration policy to the forefront, since which time (20 years before the cases at bar were begun), FLSA and LMRA have marched hand in hand in American labor policy. Also, even before 1947 the 1925 Arbitration Act was held to be applicable to FLSA cases: *Donahue* v. *Susquehanna Collieries Co.*, (1942) CA-3, 138 F.2d 3 and *Watkins* v. *Hudson Coal Co.*, (1945) CA-3, 151 F.2d 311.

The dissenting Opinion of the Supreme Court of Iowa is, we believe, a persuasive brief for petitioner's position; we are happy to be privileged to present it to this Court. May we, with complete respect, point to three places in that minority Opinion where, we believe, our view and the view of the dissenting Justices are set forth with somewhat less definiteness than they merit? In all three instances the portions that we shall quote might be read as recognizing that the substantive rights claimed by the respondents derive from statute; the correct view, we are convinced, is that their substantive rights flow simply from the Collective Bargaining Agreement. The sentences here concerned are these: (Appendix A.21): "Plaintiffs do not

quarrel with these general rules but claim that as their rights arise out of a federal statute rather than out of the collective bargaining contract they have the right to elect whether to file suit or follow the grievance procedures in the agreement." (Appendix A.25): "These considerations are just as strong under a claim for overtime wages under the FLSA as they would be under a contract provision." (Appendix A.25): "Any distinction between the instant case and *Republic Steel Corporation* v. *Maddox* must be based on the fact that plaintiffs' rights here are based on statute (FLSA) and plaintiff's rights in *Maddox* were based on the contract." The sentences we have quoted were probably written in terms of remedial rights rather than in terms of substantive rights; so viewed, there is no confusion, and our case is the stronger. The substantive rights here are derived solely from the contract.

Discussion of the Cases:

To avoid burdening this Court with repeated citations and quotations, may we indicate briefly that the applicable underlying points and case citations supporting petitioner's views are set forth in the four opening paragraphs of Division II of the prevailing Opinion of the Iowa court (Appendix A.17) (but the majority "are inclined to think" "that the United States Supreme Court will apply *Arguelles* to FLSA cases" "although the question is close.") (Appendix A.18); and they appear at considerable length, with quotations, in the *dissenting* Opinion in Iowa (Appendix A.20-A.28); and in the dissenting Opinion of this Court in *Arguelles*. We respectfully incorporate those as part of petitioner's argument, and limit our discussion to the following:

Republic Steel Corporation v. *Maddox* (1965), 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580, was an action brought in a *State* court in Alabama for severance pay under a collective bargaining agreement. *Maddox* made no effort to utilize the grievance and arbitration procedures. Instead, he sued for breach of contract. The trial court awarded him a money judgment; two higher State courts of Alabama affirmed. This Court reversed. In an opinion by Mr. Justice Harlan, writing for eight members of the Court, this Court ruled that the general federal rule applies, that the employee must attempt use of the contract grievance procedure. We respectfully submit that *Maddox* (not *Arguelles*), rules our case.

In *Arguelles,* Mr. Justice White, writing for four members of the Court, stated (p. 473 of 27 L. Ed. 2d) that all issues in that case (including the question of the statutory penalty) were suitable for arbitration. And, on the same page, he noted that "circuit courts of appeal both before and after passage of Section 301 have required that FLSA employee's claims for liquidated damages under 29 USC Section 216 (b) for failure to pay overtime wages be referred to contractual procedures before being presented to the court."

POINT III

Meal-Time Is Strictly and Simply a Contract Right; Nothing in the Fair Labor Standards Act Requires an Employer Commitment To Work-Free Lunch-Time.

Given the employer-employee relationship, there is nothing in the FLSA that requires an employer commitment to work-free lunch-time. Where an employer makes such a committment by contract, he must, of course, bear the consequences of a breach. In this, the FLSA is quite unlike the statute in *Arguelles;* there

the statute granted (to a special group as "wards of the Admiralty") both the right and the remedy. The FLSA remedy may (not must) include liquidated damages and attorney fees, enforceable, as we have noted, by arbitration.[2]

POINT IV

Four United States Courts of Appeals Decisions in Fair Labor Standards Act Cases (Before and After LMRA Section 301) Require That Attempt Be Made To Utilize the Grievance and Arbitration Provisions.

Arbitration Provisions

We find four such FLSA cases: *Donahue* v. *Susquehanna Collieries Company* (CA 3) (1943) 138 F.2d 3 (claim for overtime wages); *Watkins* v. *Hudson Coal Company* (CA 3) (1945), 151 F.2d 311 (cert. denied 1946, 327 U.S. 777 and 816) (claim for overtime wages, liquidated damages, attorneys' fees and costs) (in that case the opinion states "A brief has also been filed for the Administrator of the Wage and Hour Division, United States Department of Labor"); *Evans* v. *Hudson Coal Company* (CA 3) (1948), 165 F.2d 970 (claim for regular and overtime pay, liquidated damages, fees and costs); and *Beckley* v. *Teyssier* (CA 9) (1964), 332 F.2d 495 (claim for overtime pay for time in travelling between job sites, and liquidated damages, fees, and costs). We may observe, in passing, that *Gatliff Coal Co.* v. *Cox* (CA 6) (1944), 142 F.2d 876

[2] While irrelevant to the legal question here at issue, it is interesting to note that the judgment rendered below awards a windfall to these employees, that is, pay at the rate of time and one-half for eating their meals; actually, in addition, they did get their time out to eat. (R. 12, 18, 19, 20, 22). There were some rare exceptions (R. 24); in one instance, the Union presented a grievance on the point; the result was that "the company paid the people." (R. 26).

is no longer to the contrary, having been decided three years before the 1947 LMRA.

(The United States Arbitration Act of 1925, referred to in those four decisions, and printed as Supplement B at the end of this brief, evidences Congressional interest in arbitration 13 years before the Fair Labor Standards Act of 1938.)

As noted above, Mr. Justice White's dissenting opinion in *Arguelles* refers to the foregoing cases with approval, as being within the rule of *Maddox.*

And the dissenting opinion by the Supreme Court of Iowa contains a rather complete discussion of these FLSA cases, including extensive quotations from some of the opinions. (A. 21-A. 23). We respectfully refer thereto; we refrain from repetition here.

POINT V

The Rights of Employees To Bring Action in Court Are Rigidly Qualified by the Fair Labor Standards Act and Are Seriously Restricted in Practice.

Mr. Justice Harlan wrote the opinion for the Court in *Maddox;* also, he wrote a separate concurring opinion in *Arguelles.* In *Arguelles,* he strongly reaffirmed the *Maddox* principle; he concurred in *Arguelles* solely because the severely specialized seaman's statute in *Arguelles* was the source of the seaman's *substantive* rights; and so he urged the need for close study of the statute before decision. That last may be wholly irrelevant here, because here the *substantive* rights of these respondents come solely from the Collective Bargaining Agreement not from the statute; nevertheless, it may be appropriate to examine the FLSA more fully than we have done thus far in this brief.

The Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201-219) is a broadly generalized act; yet it rigidly restricts the rights of employees thereunder.

The declared policy of the Congress (Section 2(a)) is directed to "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers . . ."

Originally, in 1938, the protected minimum regular rate of pay was only 25 cents per hour. Since 1966 it is $1.60 per hour. In 1965, when the Collective Bargaining Agreement was made, the statutory rate was $1.25 per hour; the rates for these employees, under their contract, ranged from $2.61 per hour to $2.96 per hour (increased in 1967 to yet higher rates). (With time and one-half, in each case, for all hours beyond 40 hours in any work-week).

Section 13 of the Act lists 37 exemptions (and many others are found in Section 7).

Section 16 (a) provides for criminal actions for violations.

Section 17 provides for injunction proceedings to restrain violations.

In addition (and further unlike the statute in *Arguelles*), the Act invests the Secretary of Labor with broad administrative powers for enforcement:

Section 16 (c) provides for Wage Collections by Government, by informal administrative procedures or by action in court by the Secretary. (In such case, no liquidated damages or attorney fees are allowed.)

Section 16 (b) (printed as Supplement C at the end of this brief) provides for Wage Suits by Employees. Action *may* (not must) be maintained in any court of competent jurisdiction. A 1961 Amendment requires that that right of employees "shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 17 . . ."

In view of the foregoing, it is not surprising that "Very few of these suits have been brought by employees under section 16(b) of the act and of the few that have been brought most are initiated by individuals no longer in the employ of the defendant employer." (quoted in note 4, page 7, in Respondents' "Opposition to Petition for a Writ."). Clearly, FLSA is not designed to meet all wage controversies.

As long ago as 1942, this Court may have foreclosed the issue against the respondents. Dealing with a *wage contract* which the then federal Wage and Hour Administrator (Walling) claimed to be in violation of the 1938 FLSA, this Court rejected the argument. *Walling* v. *A. H. Belo Corporation,* (1942), 316 U.S. 624. At page 635 this Court said:

> "Where the question is as close as this one, it is well to follow the Congressional lead and to afford the *fullest possible scope to agreements* among the individuals who are actually affected." (Our emphasis).

If our case be close (we venture to believe, as does the dissenting opinion in the Supreme Court of Iowa, that it is not close), it is significant to note this priority granted to contracts by this Court under FLSA, five

years before the additional Congressional mandate of the 1947 LMRA came upon the scene.[8]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgments of the Courts below be reversed.

LOUIS S. GOLDBERG
Counsel for Petitioner
300 Commerce Building
Sioux City, Iowa 51101

P. L. NYMANN
Co-Counsel for Petitioner
P. O. Box 515
Dakota City, Nebraska 68731

LOUIS S. GOLDBERG
and
P. L. NYMANN
On the Brief

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[8] In *Brooklyn Savings Bank* v. *O'Neill*, 324 U.S. 697 (1946), this Court said that the legislative history of FLSA "shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages * * * due to the unequal bargaining power as between employer and employee . . ."; so, too, in *D. A. Schulte, Inc.* v. *Gangi*, 328 U.S. 108 (1946).

Moreover, except for the small minimum wage guaranteed, the courts recognize that FLSA actions are actions on contract. *Republic Pictures Corp.* v. *Kappler* (cited by Respondents, Brief p. 11), 151 F.2d 543, aff'd per curiam 327 U.S. 757 (1946) states:

> The action for overtime under the statute is an action on contract; at least, the Federal statute is bottomed upon a contract of employment. As said in *Northwestern Yeast Co.* v. *Broutin*, 6 Cir., 133 F.2d 628, "The Federal statute is premised upon the existence of an employment contract * * * The action for double compensation may be considered as debt or as an action for wages due under the employment agreement."

SUPPLEMENT A

Labor-Management Relations Act

June 23, 1947, c. 120, Title II, Section 203, 61 Stat. 153, 29 U.S.C. Section 173 (d).

(d) Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptionol cases. June 23, 1947, c. 120, Title II, § 203, 61 Stat. 153.

June 23, 1947, c. 120, Title III, Section 301, 61 Stat. 156, 29 U.S.C. Section 185 (a) et seq.

§ 185. Suits by and Against Labor Organizations—Venue, Amount, and Citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

SUPPLEMENT B

United States Arbitration Act

Act of Feb. 12, 1925, c. 213, Section 3, 43 Stat. 883, codified July 30, 1947, c. 392, 61 Stat. 670, 9 U.S.C. Section 3.

§ 3. Stay of Proceedings Where Issue Therein Referable to Arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied

that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

July 30, 1947, c. 392, 61 Stat. 670.

SUPPLEMENT C

Fair Labor Standards Act

29 U.S.C. Sec. 216, Section 16 (b) of the Act as amended.

(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

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IN THE

Supreme Court of the United States

October Term, 1971

70-286

IOWA BEEF PACKERS, INC.,
Petitioner,

v.

EDWARD D. THOMPSON, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF IOWA

BRIEF FOR THE RESPONDENTS

RAYMOND EDWARD FRANCK
Raun & Franck
Counsel for Respondents

203 N. Main
Denison, Iowa 51442

THE CASILLAS PRESS, INC.—1717 K Street, N. W.—Washington, D. C.—223-1220

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Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The trial court's denial of Petitioner's motion to dismiss (A. 7-8)[1] and the trial court's final judgment

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[1] "A." references are to the printed appendix prepared for this Court. "R." references are to the record in the Iowa Supreme Court, filed with the briefs in this Court.

(A. 9-10) are unreported. The opinions of the Iowa Supreme Court (A. 12-28) are reported at 185 N.W.2d 738.

JURISDICTION

The opinions of the Iowa Supreme Court issued April 9, 1971 and certiorari was granted October 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES

This case arises under §§7(a) and 16(b) of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq.* (Supp. A, *infra*). Relevant portions of §§4, 6, 7, 10 and 11 of the Portal-to-Portal Act of 1947, as codified, 29 U.S.C. 251 *et seq.*; and of the United States Arbitration Act of 1925, as codified, 9 U.S.C. 1 *et seq.*, are printed as Supplements B and C respectively, *infra*. §§203(d) and 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. 173(d), 185(a) are printed as Supplement A to Petitioner's Brief.

QUESTIONS PRESENTED

1. Whether an arbitrable dispute existed on the facts of this case.

2. Whether employees asserting substantial federal rights under the Fair Labor Standards Act are required to attempt exhaustion of arguably applicable private grievance-arbitration procedures before bringing suit to vindicate those rights in court.

STATEMENT OF THE CASE

I. Facts

At all relevant times Petitioner was engaged in the processing and sale of meats in interstate commerce at Denison, Iowa, and its employees were covered by a collective bargaining contract with the Associated Employees Organization which provided time and one-half payment for hours worked in excess of forty per week and guaranteed "A lunch period . . . no later than five hours from the start of an employee's shift" (A. 29).[2] The contract also contained a no-strike clause, and further provided that "Should the Union or any individual employee desire to process a grievance pertaining to a violation of the Agreement, the matter shall be handled" by a three-step grievance procedure culminating in binding arbitration (A. 31, 29; R. 6). The first step of this grievance procedure was foreclosed if the aggrieved employee did not submit a written grievance "within ten days of the knowledge of the incident"; subsequent steps were deemed waived if stringent time limitations for pursuing them were not met; and control of his grievance after the first step was taken from the "individual employee" and placed in the exclusive hands of "the Union grievance committee or any officers designated by the Union" (A. 29-30, 31; R. 6-7, 8). Arbitration could only be invoked by the Petitioner or the Union, and the arbitrator's authority was expressly limited to application of "the terms and conditions specifically set forth in the Agreement" (A. 30; R. 8).

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[2] Coverage of Petitioner under the Fair Labor Standards Act is admitted (A. 2-3, 4-5; R. 9). The "Associated Employees Organization" is apparently a Company Union.

From the Denison plant's opening in 1961 it was plagued with mechanical breakdowns, and the maintenance employees working under this contract were required to stay on the premises during their lunch period and to eat close to the kill floor where they could hear the bell signalling production stoppages (A. 14, 16; R. 10, 12-13, 17-18, 20-21, 25, 36, 38; 41-42).[3] Each time the bell sounded they were expected to abandon their lunch and help with repairs – a situation which frequently occurred several times in a single day (A. 14; R. 12-13, 18, 19-20, 22, 24-25, 29, 35-36, 44). In 1962 the Company constructed a special lunchroom for maintenance men, within hearing of the bell, for the express purpose of ensuring that they were "on call" at all times to mitigate expensive breakdowns. Other employees ate in locations beyond the bell's reach (A. 14; R. 10, 13, 17, 19, 21-22). In February 1966 one of the maintenance men filed a grievance over his failure to get full lunch periods which precipitated a meeting with Company officials at which the maintenance men were told that they were free to leave the plant during lunch and that their lunch periods would be staggered so that only those not eating would be called (A. 14; R. 15, 19-20, 26-27, 28-30, 34-35; 42-43). However, the grievance was never processed, and the situation continued as before: the equipment continued to break down, the maintenance men were required to stay close and answer the bell regardless of their lunch status, and the only way they could escape being called was to leave the plant during their brief lunch period, at risk of discipline, before the bell was

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[3] Facts found by the courts below are admitted by Petitioner for purposes of this review (Pet., p. 3 para. 5, 4; Pet. Br., p. 5).

rung (A. 14-15, 16-17; R. 11, 12, 21-23, 29, 30-31, 36, 38, 39, 40; 43-44).[4]

In 1967, after the instant complaints were filed, the Company's vice-president for industrial relations wrote the maintenance men repeating "Because of the claims made in the law suits . . . that you are not required to eat in any particular area or even to remain on the premises during your lunch period" and inviting them to grieve "if, at any time, you receive any instructions from any management persons which seem contrary to the above" (A. 15; R. 11-12, 14-15, 18, 31-32, 39, 40). When three maintenance men subsequently refused to answer the bell in accord with this letter they were called before the plant superintendent and ordered to "forget about [the letter]," to "just go on answering the bell" because "them guys up in the front office don't know how things are back here" (R. 11-12, 13, 14, 16-17, 21-22, 31-32; 43-44). The maintenance men were never adequately compensated for their lunch time, which was in excess of their regular forty hours per week, and were never effectively released from their duty to remain, at all times, on call (A. 3-4, 14-15, 16-17; R. 11, 12, 21, 22, 25, 29, 30-31, 35-36).

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[4] The Company's assertion that this grievance resulted in the men being paid for their lunch time (Pet. Br., p. 18 n.2) is based on the self-serving statement of a Company official which is flatly contradicted by the other evidence (A. 3, 5, 14-15; R. 25, 26-27). Indeed, several maintenance men testified that they were not paid even straight time for their lunch periods and that they were not informed of any lunch-period change until May of 1967; and their testimony was stipulated to be representative (R. 9, 11-12, 13, 16, 18, 19, 21-23, 24, 25, 39, 40; 43-45). In addition, the Company officials who testified all admitted that they did not really know what went on in the production area (R. 30-32, 33, 35, 38).

II. Decisions Below

On April 28, 1967 thirteen maintenance men filed suit in Iowa District Court for overtime, liquidated damages, costs and attorney's fees under §§7(a) and 16(b) of the Fair Labor Standards Act, alleging uncompensated lunch time for the two-year period preceding suit (A. 2-4).[5] In March 1968 the District Court denied the Company's motion to dismiss for failure to exhaust contract grievance procedures because "the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act . . . cannot be restricted, abrogated or nullified by any agreement entered into by . . . employees with their employer, or by and through a collective bargaining agreement entered into with the employer and the representative of the employees" (A. 8). After full trial the Court found that the maintenance employees were on call during their lunch periods and awarded them the overtime, costs and attorney's fees claimed, but declined to award liquidated damages (A. 9-10; R. 40-46). The Iowa Supreme Court affirmed by a vote of five to two on the ground that "the general Congressional intent favoring arbitration can[not] stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court," and that "if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's act involved in *Arguelles* [see *infra*, pp. 15-17] . . . then an intent to give workmen such an

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[5] Damages for violations occurring earlier than two years preceding suit are precluded by the applicable statute of limitations. Portal-to-Portal Act, §6(a), *infra*, Supp. B, 29 U.S.C. 255(a). A fourteenth plaintiff filed suit on December 12, 1967 (A. 1).

option is also manifest in the Fair Labor Standards Act" (A. 19-20).

ARGUMENT

I. THE FEDERAL POLICY FAVORING ARBITRATION OF LABOR DISPUTES IS NOT IMPLICATED HERE BECAUSE NO ARBITRABLE QUESTION WAS PRESENTED UNDER THE CONTRACT, THAT POLICY IS NOT APPLICABLE, AND RESPONDENTS COMPLIED WITH IT IN ANY EVENT.

The arbitration policy erected by this Court under §301(a) of the Labor Management Relations Act – that disputes between parties to a collective bargaining contract affording grievance-arbitration are presumed arbitrable, *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581 (1960), and that "As a general rule . . . federal labor policy requires that individual employees wishing to assert *contract* grievances must attempt use of the contract grievance procedure," *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis added) – is dependent upon the availability of adequate grievance procedures. *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 582-583; *Republic Steel Corp. v. Maddox, supra*, 379 U.S. at 653, 656. Where the contract makes a subject non-arbitrable, or so limits the arbitrator's authority as to preclude a meaningful remedy, the policy does not apply. See *Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 582; *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 243 (1962). Both factors are present here. The contract sharply limits its grievance procedures to "violation[s] of the Agreement" (A. 29), and contrary to Petitioner's contention (Br., pp. 3, 4, 5, 6), Respondents assert no violation by the Company of a contract right to work-free

lunch periods; they merely seek to be paid for lunch time because it was subject to call. *E.g., Armour & Co. v. Wantock,* 323 U.S. 126 (1945). But the contract says nothing about the duration of lunch periods or their status as on-call or free; it merely states that "A lunch period shall be provided no later than five hours from the start of an employee's shift" (A. 29). Since such a period was unquestionably provided (Pet. Br., p. 18 n. 2; A. 3, 16-17; R. 10, 12, 17-18, 19-20, 22, 28-29, 35-37; 41-43, 45), this term could not have been violated, and the dispute was not arbitrable. "For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." 363 U.S. at 582. While a typical arbitrator might have applied the common law of the shop to this lunch period provision to determine whether it incorporated duration and status requirements, and was therefore violated, the instant contract precludes such action by expressly stating that the arbitrator "shall not have authority other than to apply the terms and conditions specifically set forth in the Agreement" — a limitation which effectively blocks meaningful arbitration here. *Id.,* at 580. The only other contract term which might conceivably have been violated so as to constitute a "grievance" as defined was the provision stipulating time and one-half payment for hours worked in excess of eight per day or forty per week (A. 29). But that term is admittedly dependent upon a finding that the lunch period provision has been breached (Pet., pp. 2 para. 2, 3 para. 4, 7-8, 11; Pet. Br., pp. 6, 11-12, 17). Moreover, the contract is as silent regarding the content of "hours worked" as it is on the duration and status of any lunch periods; and since Petitioner neither argued this provision below nor raised it as an independent ground for arbitral jurisdiction in its petition for certiorari (Cf. A. 17; Pet., pp. 2 para. 2,

5 para. 3, 7-8, 11) Petitioner should be precluded from raising it here. *Walters v. St. Louis*, 347 U.S. 231, 233 (1954); *Hormel v. Helvering*, 312 U.S. 552, 556 (1940). See cases collected under 28 U.S.C.A. 2106, n. 25 (1967). Indeed, in light of the Company's consistent position that only a contract right to work-free meal time is involved (Br., pp. 6, 7, 8, 10, 11, 15-16, 17, 19) and that compensating these employees awards a "windfall" because they actually got some time to eat (Br., p. 18 n. 2; "Resistance," pp. 3-4; A. 17), Petitioner's arguments reduce to the single contention that its interpretation of "hours worked" as excluding on-call time does not contravene the Fair Labor Standards Act. That position on "hours worked" may be a correct interpretation of this contract; but since the arbitrator is limited to construction of the contract, and cannot pass on statutory claims or defenses absent a submission incorporating them, see *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 599 (1960); cf. *Wilko v. Swan*, 346 U.S. 427, 432 n. 18 (1953), such a contention is not arbitrable either.

No different result is required by the Company's incessant attempts to drag this case within the ambit of *Republic Steel Corp. v. Maddox, supra*, by insisting that only a pure contract right to work-free lunch periods – which nowhere appears in the contract – is involved. In the first place, that contention seriously distorts the record. The employees' complaint was squarely bottomed on statutory right (A. 2-3, 5); the trial court denied Petitioner's motion to dismiss on the ground that a statutory right could not be diminished by contractual agreement (A. 8); both sides of the court below thought a statutory right was being asserted (A. 14, 19-20, 21, 25, 26); and Petitioner's reliance on the dissenting opinion in *U.S. Bulk Carriers v. Arguelles*, 400 U.S. 351 (1971), which solely

concerned a conflict between contract arbitration and a federal statute, belies awareness that a statutory right is implicated here. That the FLSA provides for no work-free lunch time (Pet. Br., p. 10, *passim*) is wholly irrelevant. The FLSA requires employers to pay time-and-a-half for hours worked in excess of forty per week (Supp. A., *infra*); it was intended to apply uniformly "to all employers subject thereto unless expressly exempted," *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 & n. 25 (1945); contrary to Petitioner's suggestion (Br., pp. 12-13), it contains no blanket exemption for employers operating under collective bargaining contracts. If no contract had existed, these employees could still have asserted their identical claim. If they had worked through every lunch period and not totalled over forty hours per week, they would have had no statutory claim whatever their contract rights. Two distinct rights are clearly involved here, one contractual and arguably remediable by arbitration, one statutory and looking, at least ordinarily, to direct relief in court. That they may overlap does not mean either is extinguished.[6]

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[6] Petitioner's similar suggestion that Respondents are estopped from asserting federal labor rights because they accepted general benefits under a collective bargaining contract affording arbitration (Br., pp. 3, 6, 12, 14-15) is equally inapposite. Since the employees would have possessed the same FLSA rights had no collective bargaining contract existed, they cannot be estopped from asserting those rights merely because a union negotiated additional benefits for them. Under Petitioner's reasoning, employees would be foreclosed from filing unfair labor practice charges because they happened to benefit from contracts containing internal means of adjustment – a result this and other courts have consistently rejected. See, *e.g.*, *NLRB v. Strong*, 393 U.S. 357 (1969); *NLRB v. Marine Workers*, 391 U.S. 418, 424 and cases there cited (1968); *NLRB v. C&C Plywood Corp.*,

(continued)

Second, even if *Republic Steel Corp. v. Maddox* is applicable, Respondents substantially complied with it. If, as the Court there noted, "it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until [he] has attempted to implement the procedures and found them so," 379 U.S. at 653, such an attempt was plainly made here. As shown *supra*, pp. 4-5, a year before these suits were filed one of the maintenance men instituted grievance procedures because he was not getting a lunch period five hours after the start of his shift, as guaranteed by the contract. This action precipitated a hasty meeting with Company officials at which some maintenance men were told that they could leave the premises during lunch and that their lunch periods would be staggered so all could eat in accord with the contract; but these promises were ignored by the employees' supervisors,

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[6] (continued) 385 U.S. 421, 428 (1967); *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-437 (1967); *Carey v. Westinghouse Corp.*, 375 U.S. 261, 270-272 (1964); *Machinists Lodge 743 v. United Aircraft Corp.*, 337 F.2d 5, 8, 9 (C.A. 2, 1965). Cf. *Smith v. Evening News Assn.*, 371 U.S. 195, 197 (1962); *Teamsters Local 674 v. Lucas Flour Co.*, 369 U.S. 95, 101 n. 9 (1962).

Petitioner's further reliance on *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (C.A. 8, 1945), aff'd mem. 327 U.S. 757, for the proposition that FLSA claims are contract actions (Br., p. 22 n. 3), is wholly misplaced. That case arose before the FLSA contained a statute of limitations, and merely characterized FLSA claims as contract actions for statute of limitations purposes in the course of holding a state statute discriminatorily restricting the time for filing federal claims unconstitutional. *Id.*, at 546-547. Characterizing FLSA claims as procedural contract actions in order to expand court access of course has no relation to characterizing them as substantive contract claims for purposes of restricting court access.

and the Union never processed the grievance. If a grievance for lunch time which was clearly arbitrable under the contract proved so ineffective, the employees could only have thought that a grievance for lunch pay which was arguably arbitrable, and difficult to win,[7] would only prove more so. Indeed, the futility of this grievance seems to have been the principal motive for the instant suits (A. 14-15). Particularly in light of the susceptibility of employees to employer suasion, see *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); the Union's passivity; the fact that even after these suits similar promises were made and equally ignored, *supra*, p. 5; the fact that the employees were bluntly ordered by the plant superintendent and his immediate subordinates to "forget about grieving", *supra*, p. 5; and the admission of Company officials that they had no knowledge of or real control over the maintenance men's condition (R. 30-32, 33, 35) – a fact which must surely have been obvious to the maintenance men themselves – Respondents clearly "attempted to implement the [grievance] procedures and found them [inadequate]." 379 U.S. at 653. No more should be demanded, since the courts will not require a futile act as a condition precedent to court vindication of an existing right. *Glover v. St. Louis-San Francisco Rway. Co.*, 393 U.S. 324, 329-331 (1969); *Desrosiers v. American Cyanamid Co.*, 377 F.2d 864, 870 (C.A. 2, 1967); see *Vaca v. Sipes*, 386 U.S. 171, 185-186 (1967).

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[7] It seems clear that if arbitration were ever reached the Company would again argue that on-call time was not "hours worked" under the contract (A. 15-17). Such contentions have been accepted by arbitrators. See, e.g., 65-2 CCH Arb. ¶8691 (1965); cf. 64-1 CCH Arb. ¶8270 (1963); 61-2 CCH Arb. ¶8377 (1961).

Finally, *Republic Steel Corp. v. Maddox* is not applicable to this case. The arbitration requirement of *Maddox* and the *Steelworkers Trilogy*[8] primarily rested on the assumption that grievance procedures afforded continued bargaining between employer and union to fill in the gaps in the contract proper. *Steelworkers v. Warrior and Gulf Co., supra,* 363 U.S. at 580-581; *Steelworkers v. Enterprise Wheel & Car Corp., supra,* 363 U.S. at 596; *Maddox, supra,* 379 U.S. at 653. As the *Maddox* court noted, "Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." *Id.* This position was entirely proper, since *Maddox* and the *Steelworkers* cases presented contract disputes decided under §301 of the Labor-Management Relations Act – a statute whose main thrust is to promote collective bargaining by getting the parties to the bargaining table, without regulating the terms and conditions of employment on which they may subsequently agree. *E.g., H. K. Porter Co. v. NLRB,* 397 U.S. 99, 103-106 (1970); *NLRB v. C&C Plywood Corp.,* 385 U.S. 421, 427 (1967). But the Fair Labor Standards Act imposes absolute requirements regarding minimum-wage and overtime; unlike the LMRA, it was *intended to regulate,* with nationwide uniformity, the terms of employment to which it speaks. *E.g., U.S. v. Darby,* 312 U.S. 100 (1941); *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697, 710 & n. 25 (1945). In the face of such absolute statutory requirements, no union interest in further bargaining through the grievance process is present, since there is nothing to bargain over; either the employer has violated the Act, or he has not. This is particularly true where, as here, rights under the statute are

[8] *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.,* 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

expressly granted to individual employees independently of the collective-bargaining relationship, and cannot be waived or altered by their bargaining representatives because those rights are not merely compensatory, but enforcement tools designed to protect competing employers from whose interests the union's may radically diverge. *E.g.*, FLSA §§2, 16(b), Supp. A, *infra;* Portal Act, §3, 29 U.S.C. 253; *Schulte v. Gangi*, 328 U.S. 108, 116 (1946). As this Court has approvingly noted, "An employer is not to be allowed to gain a competitive advantage by reason of the fact that his employees [or their bargaining representative] are more willing to waive [FLSA] claims . . . than those of his competitor . . . No employee . . . need fear that the fair labor standards maintained by his employer will be jeopardized by oppresive labor standards maintained by those with whom his employer competes." *Brooklyn Savings Bank v. O'Neil, supra*, 324 U.S. at 710 & n. 25. We show *infra*, pp. 15, 21-27, that to require unions to process such claims through grievance arbitration would undermine this salutary policy without advancing competing ones.

Republic Steel Corp. v. Maddox additionally rested on the dual assumption that "handling of grievance claims will enhance the union's prestige with employees" and that absent compulsory arbitration of troublesome contract claims employers would attempt to exclude these subjects from the grievance-arbitration process. 379 U.S. at 653, 656. But where, as here, the statute guarantees employees a calculable remedy and the union's pursuit of their grievance wins them less – a significant danger in view of the fact that the arbitrator is bound to the contract, 363 U.S. at 597, 599, the contract may preclude statutory remedies even if a breach is found, and the union's nearly unreviewable

discretion to settle contract claims short of arbitration, *Vaca v. Sipes, supra,* 386 U.S. at 191-192, 194-195 – the union's prestige will be diminished, not enhanced. Moreover, it is common knowledge that the statutory wage-hour guarantees are a powerful aid to union bargaining, especially in areas where the Act's application is unclear; and assertion of statutory claims by individual employees in court relieves unions of the considerable time and expense involved in the higher steps of grievance proceedings. 386 U.S. at 191-192; *NLRB v. Acme Industrial Co.,* 385 U.S. 432, 438 (1967). If such claims are universally forced through grievance arbitration subject to contract diminishment, the uncertainties of extraevidentiary and unreviewable arbitral decision, see 363 U.S. at 596; *Bernhardt v. Polygraphic Co.,* 350 U.S. 198, 203-204 & n. 4 (1956), and the incurring of extra expense, unions rather than employers will seek to restrict the scope of grievance-arbitration so as to exclude them from its reach. Congress and the *Maddox* court could not have intended, and this Court should not reach, such a result.

II. FEDERAL LABOR POLICY FAVORING ARBITRATION OF PRIVATE-CONTRACT CLAIMS DOES NOT APPLY TO THE ASSERTION OF FEDERAL PUBLIC STATUTORY RIGHTS UNDER THE FLSA.

Maddox and the *Steelworkers Trilogy* involved pure contract disputes in which the resisting party was remitted to grievance-arbitration because he had agreed to it as the mode of redress. 379 U.S. at 652; *Vaca v. Sipes, supra,* 386 U.S. at 184. Neither involved an independent statutory remedy, let alone an independent statutory right.

But in *U.S. Bulk Carriers v. Arguelles*, decided the past term, this Court held that a federal statute giving seamen the right to sue in court for prompt payment of wages and double damages prevailed over a contract arbitration clause unquestionably covering the dispute, despite the fact that the seaman's substantive rights were purely contractual and the statute merely afforded him a remedy. 400 U.S. 351, 352, 362, 371, 374 (1971). Four justices held that the 1790 statute, which merely provided that double damages "shall be recoverable as wages in any claim made before the court," implied "a right to make the claim to the court and not a duty to make it before a grievance committee or . . . an arbiter," *Id.*, at 353-354; that "while an arbitrator . . . may have [factual] expertise, for 180 years federal courts have been protecting the rights of seamen" and possessed equal skills, *Id.*, at 356;[9] and that "the chronology of the two statutes – §596 [of the seamen's act] and §301 [of the LMRA] – makes clear that the judicial remedy was made explicit in §596 and was not clearly taken away by §301. What Congress has plainly granted we hestitate to deny." *Id.*, at 357. Moreover, the majority noted, *Ibid.*,

> In *Maddox* there was no express exception governing individual [contract] claims of employees from §301 grievance procedures and we declined to carve one out under the circumstances there present. The circumstances here are quite different because of the express judicial remedy created by §596. The reluctance in *Maddox* to

[9] This observation was not practically accurate, for the courts had only resumed such protection since 1946, when the shipping commissioners who had performed this function for 75 years were eliminated. *Id.*, at 355.

> redesign the statutory regime of §301 makes us equally reluctant to redesign the statutory scheme of §596.

They therefore concluded that the seaman could grieve or sue at his option. Justice Harlan concurred on the ground that while the mere statutory provision of a judicial forum did not *per se* foreclose grievance-arbitration, the presence of a statutory remedy rebutted the requirement of arbitration because of the "congressional policy to secure to the individual seaman the prompt payment of his wages as part of a broader protective and remedial scheme" which could not be foreclosed by "the unreviewable discretion of the arbitrator." 400 U.S. at 359, 362-363, 365. The dissent expressly relied on the fact that the contract in question provided for arbitration of all disputes between the parties rather than just contract claims, and that the statutory remedy was entirely dependent upon a finding that the plaintiff's contract claim was valid. *Id.*, at 371, 373.

This case is far stronger than *Bulk Carriers.* The statute there merely implied a right to sue in court; the FLSA is explicit. The statute there antedated the LMRA; the FLSA also antedates the LMRA, and the courts have been continuously applying it for eight years longer than the seaman's act. 400 U.S. at 355; n. 9, *supra.* That the FLSA is more recent than the seaman's act does not, as Petitioner argues (Br., pp. 7, 12-13), undercut its priority, but rather strengthens that priority, since the FLSA was a far more important statute enacted close in time to §301, yet the legislative history of §301 evinces no intent to displace the FLSA in favor of arbitration either. Cf. 400 U.S. at

352, 356.[10] Moreover, the factors on which the *Bulk Carriers* dissent relied are not present here. The instant arbitration clause is narrowly limited to violations of the contract, and does not encompass violations of the unwritten common law of the shop, much less statutory disputes (A. 29, 30). The instant statute, unlike the seaman's act, confers an independent right as well as a remedy,[11] and

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[10] Petitioner's suggestion that the U.S. Arbitration Act of 1925 shows a congressional preference for labor arbitration which antedates the FLSA (Br., pp. 15, 18-19) is legally untenable, since that Act specifically excludes contracts of employment from its reach. 81, Supp. C, *infra; Lincoln Mills of Ala. v. Textile Workers*, 230 F.2d 81, 86-87 (C.A. 5, 1956), aff'd sub silentio as to this point, 353 U.S. 448 (1957); *Electrical Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 and cases cited (C.A. 4, 1954); *Mercury Oil Refining Co. v. Oil Workers*, 187 F.2d 980, 983 and cases cited (C.A. 10, 1951). Cf. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 201 n. 2 (1956) (by implication). In the Arbitration Act "Congress was steering clear of compulsory arbitration of labor disputes, and unless the excepting clause . . . is applied to the entire act . . . sec. 4 would give the court power to force arbitration in any agreement providing for arbitration where there is jurisdiction because of diversity . . . or other reasons." *Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 36 (C.A. 6, 1948).

As Justice Frankfurter noted in his *Lincoln Mills* dissent, 353 U.S. at 466, "In 1925 Congress passed the . . . Arbitration Act . . . explicitly excluding 'contracts of employment' . . . from its scope. . . . I find rejection, though not explicit, of the availability of the Federal Arbitration Act to enforce [labor] arbitration clauses in the silent treatment given that Act by the Court's opinion . . . I would make this rejection explicit, recognizing that when Congress passed legislation to enable arbitration agreements to be enforced by the federal courts, it saw fit to exclude this remedy with respect to labor contracts."

[11] Petitioner's claim that the seaman's statute in *Bulk Carriers* conferred "both the right and the remedy" (Br., pp. 17-18) misstates that decision. Cf. 400 U.S. at 352-353, 362, 367-371, 374.

that right is not merely intended to ensure private-party compensation, cf. 400 U.S. at 364-365, but is designed to protect employees from detrimental work conditions, and complying employers from substandard competition, as part of a public remedial enforcement scheme far broader than the seaman's act. §2, Supp. A, *infra;* cases *supra,* pp. 13-14; *Wirtz v. Malthor,* 391 F.2d 1, 3 (C.A. 9, 1968).

Thus, §16(b) provides for the recovery of unpaid wages, and "an additional equal amount as *liquidated damages*," in "*any court of competent jurisdiction*." Supp. A, *infra.* It provides for class actions if written consent of class members "*is filed in the court.*"[12] It permits "*the court in such action*" to grant reasonable costs and attorney's fees, and cuts off the employee's right to bring suit when the Secretary of Labor does. These provisions clearly contemplate unrestricted court action to vindicate FLSA claims regardless of grievance-arbitration; cf. also §15(a)(3), 29 U.S.C. 215(a)(3). And the same Congress which enacted §301 confirmed this reading by enacting the Portal-to-Portal Act amending the FLSA. That Act, which was expressly passed "to protect . . . collective bargaining," §1(b)(2), 29 U.S.C. 251(b)(2), looks entirely to court action. It provides a two-year statute of limitation for "any *action* commenced" after its enactment, "except that a *cause of action* arising out of a *willful violation* may be commenced within three years after [it] . . . accrued." §6(a), Supp. B, *infra.* It states that an action is commenced "*on the date when the complaint is filed . . . in court.*" §7. It allows a good-faith defense to an employer

[12] Thus Petitioner's contention that grievance-arbitration provides a better remedy because 14 actions were filed below (Br., pp. 4, 13) is beside the point, since a single action could as well have been filed here as in grievance proceedings.

who "*pleads and proves* that the act or omission complained of was in *good faith* in conformity with and *in reliance on* any . . . administrative regulation . . ." §10(a). Finally, it provides that:

> if the employer shows *to the satisfaction of the court* that the act or omission giving rise to such action was in *good faith* and that he had *reasonable grounds* for believing that [it] . . . was not a violation of the Fair Labor Standards Act . . . *the court may, in its sound discretion,* award no liquidated damages or . . . any amount thereof . . . [§11; emphases added throughout].

The diminishment of liquidated damages and such terms of art as "willfullness," "good faith," and "reasonable grounds" are integral parts of the statute which were plainly meant to be subject to judicial determination only. If this Court in *U.S. Bulk Carriers* could see a right to unrestricted court access in the innocuous countenance of the seaman's statute, such a right is *a fortiori* present here.

Indeed, this Court has expressly considered – and rejected – an argument that since seamen are permitted to waive their statutory rights, employees asserting FLSA rights should be, noting that

> The alternative [to unrestricted court access] is to find in the Act an intention . . . to leave the adjustments to bargaining at the worst between employers and individual employees or at best between employers and the employees' chosen . . . bargaining agent. We think the purpose of the Act [despite its silence] . . . leads to the conclusion that neither wages nor

> the damages for withholding them are capable of [such] reduction by compromise . . .[which] thwarts the public policy of minimum wages, promptly paid . . . by reducing the sum selected by Congress as proper compensation for [their] withholding.

Schulte v. Gangi, 328 U.S. 108, 113, 116 (1946). The Court has also held that the policy of prompt payment embodied in the liquidated damages provision of §16(b) is at least as central to the FLSA as to the seaman's statute, since that provision "constitutes a Congressional recognition that failure to pay the statutory minimum on time may be so detrimental to . . . maintenance of the minimum standard of living . . . and to the free flow of commerce, that double payment must be made in the event of delay in order to insure restitution" for damages difficult to prove. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 707 & n. 20 and authority cited (1945).[13] As these cases indicate, the Court has exercised exquisite restraint, even where the Act was silent, when asked to alter the enforcement scheme of this broad-ranging statute to which Congress has paid such detailed and consistent attention.[14] See also *Walling v. Belo Corp.*, 316 U.S. 624,

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[13] That Congress later injected a balancing test by permitting judicial reduction of liquidated damages where the employer acted in good faith belief that he was complying with the statute, Portal Act §11, *infra*, has not altered this fundamental purpose. *E.g., McClanahan v. Mathews*, 440 F.2d 320, 322-323 (C.A. 5, 1971).

[14] Congress has enacted major amendments to the Act in 1939, 53 Stat. 1266, 1436; 1940, 54 Stat. 615; 1947, 61 Stat. 84; 1949, 63 Stat. 446, 910; 1955, 69 Stat. 711; 1957, 71 Stat. 514; 1958, 72 Stat. 948; 1961, 75 Stat. 65; 1963, 77 Stat. 56; and 1966, 80 Stat. 830. Two major bills to further amend it are presently pending. H.R. 7130, 92nd Cong., 1st Sess. (1971) (Dent Bill); S. 1861, 92nd Cong., 1st Sess. (1971) (Williams Bill). See also H. Rept. 92-672 (1971) (to accompany H.R. 7130).

634-635 (1942); *U. S. Bulk Carriers v. Arguelles, supra,* 400 U.S. at 356-358. Where, as here, the Act is explicit, and the rights involved extend far beyond those of the immediate parties to an essentially private collective bargaining agreement, such restraint seems required.

The incompatibility of the FLSA with compulsory grievance-arbitration under §301 becomes especially apparent when the kinds of claims the FLSA produces are scrutinized. Those claims typically involve inextricably mixed questions of fact and law in which a grasp of the rules of evidence and a judicial sense of legal relevance are crucial – for instance, the questions of what constituted "hours worked," the "regular rate," and "good faith reasonable grounds" presented here. FLSA §§3(o), 7(a); Portal Act, §11; see generally, *Walling v. Belo Corp.*, 316 U.S. 624 and cases cited (1942). Moreover, as shown *supra,* pp. 13-14, 18-19, since FLSA standards are intended to protect complying employers from cheap competition by the employer charged, the utmost uniformity in their application is essential.[15] But the non-judicial, non-precedential

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15 As this Court long ago noted, the "evils aimed at . . . are the spread of substandard labor conditions through the use of . . . interstate commerce for competition by the goods so produced with those produced under the prescribed or better labor conditions . . . The Act is thus directed at a . . . kind of competition in interstate commerce which it has in effect condemned as "unfair." . . . It recognizes that in present day industry competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great." *U.S. v. Darby,* 312 U.S. 100, 122-123 (1941).

In this sense, §301(a) also militates for free court access in the assertion of FLSA claims, since its policy is also one of nationwide uniformity, and "a multiplicity of tribunals and a diversity of procedures [such as would be greatly increased if arbitration of such

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nature of arbitration – as the *Bulk Carriers* dissent put it, its "quickness" and "informality," 400 U.S. at 375 – is its defining characteristic. *E.g., Steelworkers v. Warrior & Gulf Co., supra*, 363 U.S. at 581-582. As this Court has repeatedly noted, cases which implicate statutory rights require

> subjective findings on the purpose and knowledge of an alleged violator of the Act. They must not only be [defined] but applied by the arbitrators without judicial instruction on the law. As their award may be made without explanation of their reasons and without a complete record of their proceedings, the arbitrators' conception of the legal meaning of such statutory requirements as "burden of proof," "reasonable care" or "material fact" cannot be examined.

Wilko v. Swan, 346 U.S. 427, 435-436 (1953).[16] While commercial arbitrators – who are not charged with a federal statutory duty – may possibly be required to follow the law, their interpretations of the law "are not subject,

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15 (continued) claims were required] are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491." *Vaca v. Sipes*, 386 U.S. 171, 179 (1967).

16 "Whether the arbitrators misconstrued a contract is not open to judicial review. . . . Arbitrators are not bound by the rules of evidence. . . . They may draw on their personal knowledge in making an award. . . . Absent agreement of the parties, a written transcript of the proceedings is unnecessary. . . . Swearing of witnesses may not be required. . . . And the arbitrators need not disclose the facts or reasons behind their award." *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n. 4 & cases cited (1956). Accord: *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 595, 598 (1960).

in the federal courts, to judicial review for error." 346 U.S. at 436 and authority cited. And contrary to Petitioner's contention (Br., pp. 13-14), it is by no means clear that labor arbitrators – who are charged with a special statutory duty to implement bargaining – are required to apply the FLSA, since they are confined to application of collective bargaining contracts and their construction of such contracts is all the parties have bargained for. 363 U.S. at 580-581, 597, 599. Even if they look to the FLSA "in determining the sense of the agreement," *Id.*, at 598, their application of it is unreviewable, especially since their "failure . . . to decide in accordance with the provisions of [the statute] . . . would need to be made clearly to appear." 346 U.S. at 436. And if the arbitrators' legal conclusions are so unreviewable, their factual findings are even more so, particularly in the absence of a record by which those findings could be evaluated.[17]

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[17] In this sense Petitioner's reliance on *Collyer Insulated Wire Co.*, 192 N.L.R.B. No. 150, 77 L.R.R.M. 1931 (1971) (Br., pp. 10n. 1, 14) is misplaced, since the National Labor Relations Board may undertake plenary review of an arbitral decision and find its own facts if it concludes, in its discretion, that the result does not effectuate the purposes of the N.L.R.A. *E.g., Carey v. Westinghouse Corp.*, 375 U.S. 261, 272 (1964); *N.L.R.B. v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967).

Moreover, that case involved a deferral to arbitration where the only statutory violation alleged was a refusal to bargain under §8(a)(5), 29 U.S.C. 158(a)(5), the contract contained an extremely broad arbitration clause and specifically provided for further bargaining on the disputed subject, and the parties had a long history of successful collective bargaining. 77 L.R.R.M. at 1932-34. It is extremely unlikely that such deference would have been shown if any substantive violation other than a refusal to bargain – which bargaining presumptively removes – was involved. See 77 L.R.R.M. at 1935-37; cf. 1939 (concurring opinion). As shown *supra*, pp. 13-14, promoting such bargaining is the prime purpose of the N.L.R.A.; but is utterly foreign to the purposes which the FLSA is designed to implement.

In short, "the remedy by arbitration, whatever its merits . . . substantially affects" a statutory claim because "the nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action," and "the change from a court of law to an arbitration panel may make a radical difference in ultimate result" due to the different standards of proof and judicial review involved. *Bernhardt v. Polygraphic Co.*, supra, 350 U.S. at 203. Thus an arbitrator here might simply have denied relief with no opinion, or found that "hours worked" in the contract was not meant to include on-call time. Under applicable principles, there is no basis for concluding that a reviewing court would reverse these results, much less that they are wrong. In other words, the employees' statutory FLSA rights would be subject to foreclosure by "the unreviewable discretion of the arbitrator." 400 U.S. at 365. Since an arbitrator under one contract may reach a completely different result from another arbitrator operating under the same, a separate or a successor contract, while courts acting absent arbitration provisions may reach still other results, requiring compulsory arbitration of FLSA claims would eviscerate the policy of nationwide uniformity which is central to the purposes of the Act. Cases *supra*, pp. 10, 13-14, 19. It was precisely this consideration which led Justice Harlan to conclude that where an important federal right is implicated "the presumption of comprehensiveness of the arbitral remedy is . . . rebutted" and the statutory remedies must remain available to vindicate statutory rights. 400 U.S. at 362.

Moreover, this Court has emphatically held that the Act's rights and remedies may not be altered by contractual agreement of an employer with either his employees or their union, absent statutory permission. *Brooklyn Saving*

Bank v. O'Neil, 324 U.S. 697 (1945); *Schulte v. Gangi*, 328 U.S. 108, 114-116 (1946).[18] And Congress both before and after these decisions has specified, in minute detail, the narrowly limited circumstances in which contractual agreement—and hence arbitration to effectuate and clarify such agreement, 363 U.S. at 580-581, 596-597—may be permitted to affect statutory rights. §§ 7(b)(1)(2), 7(e)(7), 7(f), 29 U.S.C. 207; Portal Act, §§ 4(a), (b), Supp. B, *infra*.[19] These carefully-drawn substantive

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[18] Petitioner's misplaced reliance on *Walling v. Belo Corp.*, 316 U.S. 624 (1942) for the proposition that "agreements among the individuals affected" should be afforded "the fullest possible scope" (Br., p. 21) cannot diminish the force of these holdings. That case involved an individual employment contract which set a bona fide regular rate of pay—a basic condition of employment. The Court refused to overturn the contract because Congress left "regular rate" undefined and disallowance would thwart the beneficial purpose of assuring the employees a steady income, *Id*, at 316 U.S. 634-635; the opinion said nothing about contractual attempts to alter the rights to which the Act spoke or the remedies provided for enforcing them. Thus, far from supporting Petitioner's position, *Belo* is a persuasive argument for the judicial restraint vis-a-vis the statutory scheme which should be exercised here. See argument *supra*, pp. 21-22.

[19] Indeed, in enacting the Portal Act Congress specifically stated that lunch-time compensation could not be varied by contract. S. Rept. 37, 80th Cong., 1st Sess., p. 45 (1947).

provisions of course say nothing about altering *remedies* by contract; and if all the Act's provisions are subject to alteration via contractual agreements to arbitrate, these provisions are superfluous. This Court "has many times found state regulation of interstate commerce, when uniformity of its regulation is of national concern, to be incompatible with the Commerce Clause even though Congress has not legislated on the subject." *U.S. v. Darby, supra,* 312 U.S. at 119. That principle applies *a fortiori* when Congress has expressly spoken and the incompatible regulation is by private agreement responding to limited private interests.

III. EVEN IF THE POLICY FAVORING COMPULSORY ARBITRATION APPLIES TO SOME FEDERAL RIGHTS, ITS APPLICATION TO FLSA CLAIMS IS WHOLLY INAPPROPRIATE AND WOULD UNDERMINE COLLECTIVE BARGAINING THROUGH ARBITRATION INSTEAD OF PROMOTING IT.

Republic Steel Corp. v. Maddox has already been partially distinguished. *Supra,* pp. 13-15. It further rested on the fact that the remedy Maddox sought "did not differ from any that the grievance procedure had power to provide" and that exclusivity and finality of arbitral determination of contract claims were essential to arbitration's success. 379 U.S. at 653, 657; see also 400 U.S. at 360-363. And the *Bulk Carriers* dissent further rested on the assumption that arbitration offered a quicker remedy to effectuate the purpose of the seaman's act than "the attention of a federal district court which may be thousands of miles away." 400 U.S. at 375. But it is by no means certain that grievance-arbitration would be quicker then than the state-court suit here, since if the union delayed beyond

the applicable time limits (A. 29-31) or refused in good faith to carry the grievance higher, arbitration and the upper steps of the grievance procedure would never be reached. Even if that delay or refusal were in bad faith, the employee's burden in surmounting it is heavy. *Vaca v. Sipes, supra,* 386 U.S. at 185, 190-195; *Rubber Workers Local 12 v. N.L.R.B.*, 368 F.2d 12, 23 and cases cited (C.A. 5, 1966), cert. denied, 389 U.S. 837; cf. *O'Mara v. Erie-Lackawanna RR. Co.*, 407 F.2d 674, 678 (C.A. 2, 1969), affirmed sub nom *Czosek v. O'Mara*, 397 U.S. 25. (1970) (individual employees at serious disadvantage even in grievance procedures). And the quickness of arbitration is no benefit when the result is to foreclose statutory guarantees by virtue of the arbitrator's construction of the contract under which the dispute is submitted. *Supra,* pp. 24-25. Moreover, while an arbitrator might just possibly have applied "the law" to determine whether "hours worked" included on-call time, he would clearly be precluded from assessing the statutory remedy of liquidated damages, both because that remedy was meant to be subject to judicial determination only and because the contract prevented him from applying anything other than its specific terms. *Supra,* pp. 22-25. Thus, in addition to such substantive differences as evidentiary procedures and the judicial duty to justify results subject to review, *supra,* pp. 22-25, the grievance remedy would significantly have diverged from the statutory one.[20] As the *Maddox* court itself indicated in the

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[20] That divergence becomes all the more obvious when it is realized that deferral of FLSA claims pending grievance-arbitration will threaten claimants' statutory remedies with irreparable harm. Since grievance-arbitration proceedings may well consume more than

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context of Railway Labor Act rights, such differences in "the scope of review from . . . awards, and the ability . . . to give the same remedies as could be obtained by court suit" preclude compulsory arbitration. 379 U.S. at 654-655, 657 & n. 14.[21]

In order "to fairly ensure [the statute's] effectiveness" by "the exercise of [prescribed] judicial discretion," *Wilko v. Swan, supra,* 346 U.S. at 437, appeal from the arbitrator's decision for purposes of enlarging his award to statutory bounds would therefore have to be permitted. But even such an appeal would not protect employees and

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20 (cont'd) two years, *e.g., Vaca v. Sipes, supra,* 386 U.S. at 174-175, each week of unpaid compensation is a separate cause of action under the FLSA, §7(a)(1), Portal Act, §6(a), *infra,* and suits filed more than two years after accrual of cause of action are absolutely barred, Portal Act §§6, 7, Supp. B, *infra,* the damages to which such claimants are entitled will be progressively eroded the longer, beyond two years, those procedures take. Where potential claimants leave the noncomplying employer's employ a significant times before suit is filed (Cf. Pet. Br., p. 21), such erosion will be aggravated, since the "beginning" part of the withheld compensation will not be replaced by an equal "end" segment. Even if §16(b) claimants and their private counsel know enough to file a court suit simultaneously with their grievances in order to toll the statute of limitations, but see 111 Cong. Rec. 10794, 89th Cong., 1st Sess. (1965) (explanations of Senator McNamara), their statutory rights may be foreclosed by adverse or nonexistent arbitral fact determinations. *Supra,* pp. 20, 22-25.

21 The argument for preclusion is even stronger here because *Maddox* involved only a standard monetary award, *Id.,* while complete arbitral decisions here would necessarily have involved such complex legal determinations as whether the employer was acting in "good faith" on "reasonable grounds" to believe he had not violated the Act and applicable case law. *Supra,* pp. 23-25.

complying employers from extraevidentiary fact determinations made by arbitrators who are usually not lawyers, and to preserve the Act's policy of nationwide uniformity, *supra*, pp. 13-14, 19, 25, review of arbitral fact-finding – necessarily a review *de novo* where no transcript or opinion was entered – would have to be permitted as well.[22] Both types of review entail the splitting of a cause of action – a result this Court has repeatedly characterized as the worst of all possible solutions, and which is particularly inappropriate where, as here, the "essence of the legislative policy . . . is ensuring promptness in the payment of wages." 400 U.S. at 366. Accord: *Vaca v. Sipes, supra*, 386 U.S. at 185-188; *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 429-430 (1967); *Carey v. Westinghouse Corp.*, 375 U.S. 261 (1964). And in either case arbitral finality and exclusivity would unavoidably be undercut. But as both the concurring and dissenting opinions in *Bulk Carriers* recognized, the whole point of requiring arbitration of disputes is arbitration's finality and exclusivity, since only then can the employer limit the modes of redress against him and the parties "establish a uniform and exclusive method for orderly settlement of employee grievances." *Republic Steel Corp. v. Maddox, supra*, 379 U.S. 653, 656; 400 U.S. at 360, 362-363, 372-373 & n. 8, 374-377. As Justice Harlan noted, if arbitration cannot be made

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[22] Indeed, grave constitutional questions of due process and equal protection would be presented if such review in depth were not permitted merely because some employees were fortuituously covered by a collective bargaining contract affording grievance-arbitration, while others were not so covered and could secure review of factual and legal determinations in court.

final, there is little incentive for parties to include grievance-arbitration in their collective-bargaining contracts. 400 U.S. at 360, 362; 379 U.S. at 653. If arbitration cannot be made final, it merely adds another useless layer to the existing judicial structure for determining disputes, for parties will seek relief in the forum which can fully protect both rights and remedies in a single, less time-consuming proceeding, and this Court's "pro-arbitration policy," 400 U.S. at 360, will be *de facto* reversed. As shown *supra*, whatever the finality of grievance-arbitration vis-a-vis purely compensatory and essentially private statutory rights, such finality cannot be obtained except by sacrificing a prime Congressional purpose where FLSA claims are involved.[23]

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[23] Petitioner's reliance (Br., pp. 13-14, 18-19) on cases cited for the proposition that arbitration of FLSA claims was required even under the U.S. Arbitration Act of 1925 (Supp. C, *infra*) is as misplaced as its other citations. First, those cases all rested on the ground that Congessional silence in the FLSA regarding "agreement between the parties for any other method of settlement" than court suit permitted such agreement. *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3, 6 (C.A. 3, 1943); *Watkins v. Hudson Coal Co.*, 151 F.2d 311, 320 (C.A. 3, 1945), cert. denied, 327 U.S. 777, 816; *Evans v. Hudson Coal Co.*, 165 F.2d 970, 973 (C.A. 3, 1948); *Beckley v. Teyssier*, 332 F.2d 495, 496-497 (C.A. 9, 1964). That position has been explicitly rejected by this Court. *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 713 (1945); *Schulte v. Gangi*, 328 U.S. 108 (1946).

Second, *Beckley v. Teyssier* remitted to arbitration a claim for preliminary travel time which the Portal-to-Portal Act of 1947 had specifically made subject to contract determination, hence to arbitration under the contract. 332 F.2d at 496; Portal Act, §§ 4(a), (b), Supp. B *infra*. No conflict with the statutory purpose

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In the *Steelworkers Trilogy* the Court distinguished *Wilko v. Swan, supra*, because "In the commercial case, arbitration is the substitute for litigation. Here, arbitration is the substitute for industrial strife." 363 U.S. at 578. But where a statutory right is involved, litigation rather than strife will similarly ensue, and peaceful dispute-settlement is furthered by the fact that complete and calculable relief is afforded in a single action, free of possible union interference where the employees' interests and those of their representative diverge. While this Court in

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23 (cont'd) was therefore presented; and insofar as that case may be read as willing to extend compulsory arbitration to all FLSA claims, it seems clearly erroneous in light of *Brooklyn Savings Bank* and *Schulte v. Gangi*, which were apparently not brought to the court's attention by private counsel there involved.

Next, the Third Circuit cases rested on a construction of the Arbitration Act as embracing contracts of employment – a position which this Court subsequently rejected as well. *Textile Workers v. Lincoln Mills of Ala.*, 353 U.S. 448, 466 (1957) (by implication); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 201 n. 3 (1956). Indeed, the *Donahue* case, on which *Beckley v. Teyssier* and the other Third Circuit cases relied, did not even consider the express exception for "contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce" which headed that Act. 11, Supp. C *infra*. Moreover, in adopting this position the Third Circuit conflicted with both its own decisions and the position of every other circuit which passed on the issue. *Motor Coach Employees v. Penna. Greyhound Lines*, 192 F.2d 310, 313 (C.A. 3, 1951); *Penna. Greyhound Lines v. Motor Coach Employees*, 193 F.2d 327, 328 (C.A. 3, 1952); *Gatliff Coal Co. v. Cox*, 142 F.2d 876, 882 (C.A. 6, 1944); *Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33, 35-37 (C.A. 6, 1948); *Shirley-Herman Co. v. Hod Carriers*, 182 F.2d 806, 808 (C.A. 2, 1950); *Mercury Oil Refining Co. v. Oil Workers*, 187 F.2d 980, 983 (C.A.

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dicta has occasionally indicated that compulsory arbitration might apply to statutory rights, *e.g., Wilko v. Swan, supra,* 346 U.S. at 431-432; 400 U.S. at 366, the proof of the pudding is in the eating, and the Court has never once held statutory rights subject to remedial alteration, either by contract, bargaining or arbitration, in any case in which the issue was squarely presented. *Brooklyn Savings Bank v. O'Neil, supra; Schulte v. Gangi, supra; Wilko v. Swan, supra; Bernhardt v. Polygraphic Co., supra; U.S. Bulk Carriers v. Arguelles, supra.*

If it is desirable that FLSA claims be subject to compulsory arbitration, at this late date such compulsion is for Congress and not this Court to provide. The answer to Petitioner's contentions is foreshadowed by the fact that Congress has remained silent with respect to requiring such arbitration for all the 25 years since it in §301 "brought the arbitration policy to the forefront" (Pet. Br., p. 15).

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[23] (cont'd) 10, 1951); *Electrical Workers v. Miller Metal Prods.*, 215 F.2d 221, 224 (C.A. 4, 1954); *Lincoln Mills of Ala. v. Textile Workers*, 230 F.2d 81, 85-87 (C.A. 5, 1956), rev'd on another point, 353 U.S. 448; *Steelworkers v. Galland-Henning Mfg. Co.*, 241 F.2d 323, 326-327 (C.A. 7, 1957). For the tangle to which this conflict led, see the majority and dissenting opinions in *Tenney Engineering Co. v. Electrical Workers Local 437*, 207 F.2d 450, 455 (C.A. 3, 1953). The Court ultimately rejected the Third Circuit's attempt to reconcile these cases as well. Cf. *Tenney, supra*, with *Bernhardt v. Polygraphic Co., supra*, 350 U.S. at 200-201.

Finally, any vitality the basic Third Circuit cases may have possessed was sapped by the 1947 enactment of the Portal-to-Portal Act, which despite those decisions specifically reaffirmed the narrow bounds within which contractual agreement was permitted to modify FLSA rights and remedies. §§3(a), 4(a)(b), Supp. B., *infra*. And it should be noted that despite its remittals to arbitration under an

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CONCLUSION

For the above reasons the decision of the court below was correct in all respects, and should be affirmed.

Respectfully submitted,

RAYMOND EDWARD FRANCK
Raun & Franck
Counsel for Respondents
203 N. Main
Denison, Iowa 51442

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[23] (cont'd) extremely broad arbitration clause, e.g., 138 F.2d at 4, n. 1, the Third Circuit carefully decided all relevant substantive issues under the FLSA, and remitted to arbitration only calculation of the amount of money due. *E.g., Watkins v. Hudson Coal Co., supra*, 151 F.2d at 313-320; *Evans v. Hudson Coal Co., supra*, 165 F.2d at 973-974; see *Wilko v. Swan*, 346 U.S. 427, 432 n. 13, 435 (1953) (same reading). If arbitration even under a broad clause must be confined to such ministerial functions where statutory rights are involved – as the Third Circuit clearly thought despite its pro-arbitration policy – then suit to determine the legal issues must necessarily be brought prior to arbitration, and the parties to a collective-bargaining contract will be unable to achieve exclusivity in any event.

APPENDIX

SUPPLEMENT A

FAIR LABOR STANDARDS ACT OF 1938, AS AMENDED, 29 U.S.C. 201 *ET SEQ.*

§ 2(a) . . . . the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce . . . to be used to spread and perpetuate such labor conditions among the workers of the several States; . . . (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing . . . the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is . . . the policy of this Act, through the exercise by Congress of its power to regulate commerce . . . to correct and as rapidly as practicable to eliminate the conditions above referred to . . .

* * * * *

§ 3(o) Hours worked — In determining for the purposes of sections [6] and [7] the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or . . . practice under a bona fide collective-bargaining agreement applicable to the particular employee. . . .

* * * * *

§ 7(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

§ 16(b) Any employer who violates the provisions of section [6] or . . . [7] of this act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation. . . and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing . . . and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action . . . and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 in which restraint is sought of any further delay in the payment of unpaid minimum

wages, or the amount of unpaid overtime compensation. . . owing to such employee . . .

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SUPPLEMENT B

PORTAL-TO-PORTAL ACT OF 1947, 29 U.S.C. 251 *ET SEQ.*

* * * * *

§(4) . . . . (a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability. . . under the Fair Labor Standards Act. . . on account of the failure of such employer to pay an employee minimum wages, or . . . overtime compensation, for or on account of any of the following activities engaged in on or after May 14, 1947 –

(1) walking, riding or traveling to and from the actual place or performance of the principal activity or activities which such employee is employed to perform, and

(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time . . . at which such employee commences, or subsequent to the time . . . at which he ceases, such principal activity or activities.

(b) Notwithstanding . . . subsection (a) . . . the employer shall not be so relieved if such activity is compensable by either –

(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between

such employee, his agent, or collective-bargaining representative and his employer; or

(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

* * * * *

§6 . . . . Any action commenced on or after May 14, 1947 to enforce any cause of action . . . under the Fair Labor Standards Act . . . –

(a) if the cause of action accrues on or after May 14, 1947 – may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . .

* * * * *

§7 . . . . an action is commenced for the purposes of section 6 . . . on the date when the complaint is filed; except that in the case of a collective or class action instituted under the Fair Labor Standards Act . . . it shall be considered to be commenced in the case of any individual claimant . . .

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff . . . and his written consent . . . is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed . . . — on the subsequent date on which such written consent is filed in the court in which the action was commenced.

* * * * *

§ 10 . . . . (a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability . . . if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written admistrative regulation, order, ruling, approval, or interpretation . . . .

* * * * *

§ 11. . . . In any action commenced . . . on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages . . . if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 (b) of this title.

SUPPLEMENT C

U.S. ARBITRATION ACT OF 1925, 9 U.S.C. 1 *ET SEQ.*

§ 1. *"Maritime transactions" and "commerce" defined; exceptions to operation of title.* "Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies

furnished vessels or repairs to vessels, collisions, . . .; "commerce," as herein defined, means commerce among the several States or with foreign nations . . . but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. *Validity, irrevocability, and enforcement of agreements to arbitrate.* A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable. . . .

§ 3. *Stay of proceedings where issue therein referable to arbitration.* If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit . . . is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial . . . until such arbitration has been had . . . .

§ 4. . . . A party aggrieved by the alleged failure . . . of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28 . . . of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

* * * * *

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No. 70-286

In the Supreme Court of the United States

OCTOBER TERM, 1971

IOWA BEEF PACKERS, INC., PETITIONER

v.

EDWARD D. THOMPSON, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ERWIN N. GRISWOLD,
Solicitor General,
A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

RICHARD F. SCHUBERT,
Solicitor,
CARIN ANN CLAUSS,
MICHAEL H. LEVIN,
HELEN W. JUDD,
Attorneys,
Department of Labor,
Washington, D.C. 20210.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The majority and dissenting opinions of the Supreme Court of Iowa (A. 13-28) [1] are reported at 185 N.W. 2d 738. The rulings of the trial court denying petitioner's motion to dismiss (A. 7-8) and entering judgment for respondents (A. 9-10) are not reported.[2]

[1] "A." refers to the printed Appendix; "R." refers to the Record on appeal.

[2] The trial court's findings and conclusions are set forth at R. 41-45.

JURISDICTION

The judgment of the Supreme Court of Iowa was entered on April 9, 1971. (A. 13). The petition for a writ of certiorari was filed on June 16, 1971, and was granted on October 12, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED

Whether employees must exhaust any grievance procedures provided by a collective bargaining agreement before they can sue in court, pursuant to Section 16(b) of the Fair Labor Standards Act, to recover wages withheld in violation of the maximum hours provision of the Act.[2]

STATUTES INVOLVED

Sections 7(a)(1) and 16(b) of the Fair Labor Standards Act, 52 Stat. 1060, *et seq.*, as amended, 29 U.S.C. 207(a)(1) and 216(b), provide as follows:

> Sec. 7(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, * * * for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one

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[2] This brief does not discuss the additional question raised by respondents concerning the arbitrability of their claim under the contract. That question is of primary concern to the parties and does not, by itself, have any potential impact on the effective enforcement of the Fair Labor Standards Act.

and one-half times the regular rate at which he is employed.

* * * * *

Sec. 16(b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 17 * * * in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 6 or section 7 of this Act by an employer liable therefor under the provisions of this subsection.

INTEREST OF THE UNITED STATES

The Court's decision in this case is likely to have a significant impact on enforcement of an employee's federal rights under the Fair Labor Standards Act and on federal labor policy.

The Secretary of Labor, upon the employee's request or upon his own initiative in injunction suits, may sue to recover wages withheld in violation of the minimum wage and maximum hours provisions of the Act. See 29 U.S.C. 216(c), 217; see also note 16, *infra*. But private suits by individual employees under Section 16(b), 29 U.S.C. 216(b), are also an important method of securing compliance with the Act. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 709; *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288. The Secretary is therefore concerned with preserving Section 16(b) as an effective enforcement tool. The Secretary is also concerned with having the Act interpreted and applied uniformly throughout the country so that employers and employees will know what the Act requires and so that no employer will gain an unfair advantage over his competitor. Also of significance to the United States is the public purpose of the maximum hours provision involved in this case (29 U.S.C. 207), which was intended to exert financial pressure on employers to increase employment, as well as to compensate individual employees for the burden of working over 40 hours in a workweek.

STATEMENT

On April 28, 1967, respondents (13 maintenance men)[4] brought separate actions pursuant to Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. 216(b), against petitioner (their employer) in an Iowa District Court for overtime compensation due under Section 7 of the Act, 29 U.S.C. 207, and for liquidated damages and attorney's fees under Section 16(b) (A. 1–2).[5] Respondents worked in excess of forty hours a week and were engaged in the production of goods for commerce (A. 5). They sought overtime compensation for their uncompensated meal periods, during which they were required to remain "on call" for frequent emergency repairs, and claimed that this 30-minute per day period constituted compensable working time under the Act (A. 3). Petitioner, in its answer, denied this contention (A. 5) and claimed, as an "affirmative" defense, that respondents were "not entitled" to bring these actions because they had failed to exhaust the grievance procedures established by collective bargaining (A. 6).

Under the collective bargaining agreement, "any individual employee desir[ing] to process a grievance pertaining to a violation of the Agreement * * * shall discuss the matter with his immediate supervisor," and, "[i]n the event he does not receive a satisfactory answer, he shall within Ten (10) days of the knowl-

[4] Another employee filed an identical suit on December 12, 1967 (A. 1).

[5] The suits sought overtime compensation for the period April 28, 1965, to April 28, 1967 (A. 2–3). The relevant statute of limitations barred recovery of wages withheld prior to this period (see 29 U.S.C. 255).

edge of the incident submit a written grievance to his immediate supervisor" (A. 29). The agreement provides for two additional steps to be handled by "the Union grievance committee or any officers designated by the Union," after which the grievance—if "not satisfactorily adjusted"—"may be submitted to an impartial arbitrator" whose decision in the grievance [is] final and binding on the parties, provided he shall not have authority other than to apply the terms and conditions specifically set forth in the Agreement" (A. 29–30). The agreement also states that "the time allowed to process grievances is adequate" and that "[i]f the Union fails to process a grievance in the time specified herein, the grievance in question is ended" (A. 31). Other sections of the collective bargaining agreement provide that employees shall have a "lunch period" of unspecified duration (A. 29) and that "[t]ime and one-half (1½) will be paid for all hours worked in excess of forty (40) in any one week" (A. 29). The contract does not define what is meant by "hours worked."

Contrary to petitioner's statement (Pet. Br., p. 6), respondents did not seek in the present suit to enforce a work-free lunch period or any other provision of the collective bargaining agreement.[6] Instead, they

[6] One of petitioner's maintenance men did file a grievance in 1966, complaining that he was being required to work during his lunch period. This grievance was "settled" when petitioner's industrial relations officer met with the maintenance men in February 1966, and advised them that the company would stagger their shifts and that they could leave the premises for lunch (A. 14–15; R. 15, 29–31). In fact, however, the situation remained unchanged (A. 15).

claimed only that they were entitled, under the provisions of the Fair Labor Standards Act, to overtime compensation (at the statutory rate of one and one-half times their regular rate) for lunch periods during which they remained on call.

The trial court denied petitioner's motion to dismiss, stating that "the right of recovery for work performed which is compensable under the provisions of the Fair Labor Standards Act of 1938 as amended, cannot be restricted, abrogated or nullified by any agreement entered into by an employee and employer, * * * or by and through a collective bargaining agreement entered into with the employer and the representative of the employees" (A. 8). In reaching this result, the trial court pointed out that "[i]f * * * under the act such 30 minute meal periods are compensable, the fact that [respondents'] employment in [petitioner's] plant was subject to a collective bargaining agreement or that [respondents] did not proceed as provided under the grievance procedures of such agreement * * *, does not preclude recovery by the [respondents] for wages due for work which is compensable under the act" (A. 8).

The suits were tried together and on October 20, 1969, the trial court, resolving all factual and legal issues in favor of respondents, granted them unpaid overtime compensation and attorney's fees (A. 9–10).[7]

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[7] The trial court denied liquidated damages on the mistaken ground that "none of the [respondent-employees] have shown themselves to be entitled to liquidated damages" (A. 9). Although Section 11 of the Portal-to-Portal Act (29 U.S.C. 260) permits a court, "in its sound discretion," to award a lesser

The Supreme Court of Iowa, dividing 5–2 on the question "whether workmen are required to attempt contract arbitration before they can sue for overtime compensation under the Fair Labor Standards Act" (A. 14), affirmed the judgment of the trial court. The majority, relying on this Court's recent decision in *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, concluded that the general policy favoring arbitration cannot take precedence over "the specific Congressional intent * * * that workmen should have free access to the courts in FLSA cases" (A. 19). The court found this intent to be "manifest" from the "broad Congressional policy expressed in § 2 of FLSA" and the "provisions giving employees strong and detailed rights in court" (A. 19). The majority stated that the objectives of the Fair Labor Standards Act encompass "more than simply wage relief for employees; they include broad economic consid-

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amount of liquidated damages than that specified in Section 16(b) of the Fair Labor Standards Act, or none at all, it does so only "if the *employer* shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended" (emphasis added). This limited exception, as pointed out in *Wright* v. *Carrigg*, 275 F.2d 448, 449 (C.A. 4), imposes upon the "delinquent employer [who would] escape the payment of liquidated damages [a] * * * 'plain and substantial burden of persuading the court by proof that his failure to obey the statute was both in good faith and predicated upon such reasonable grounds that it would be unfair to impose upon him more than a compulsory verdict'." See also *Rothman* v. *Publicker Industries*, 201 F.2d 618, 620 (C.A. 3); *McClanahan* v. *Mathews*, 440 F.2d 320, 322 (C.A. 6). Respondents, however, did not appeal from the trial court's denial of liquidated damages.

erations—improvement in commerce among the states." "[T]he remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of [its] broader objectives." (A. 19.) The dissenting judges found no distinction between arbitrating contract and statutory rights, and stated that, in the absence of extraordinary circumstances, grievance procedures should be exhausted before suits can be brought to enforce statutory rights (A. 27).[8]

SUMMARY OF ARGUMENT

The employees' complaint in this case is based entirely on the maximum hours provision of the Fair Labor Standards Act and is in no way dependent upon the collective bargaining agreement. The issue is thus whether employees seeking to assert claims derived solely from the Act are barred from court because they did not first invoke the grievance procedures in the collective bargaining agreement.[9]

A

In Section 16(b) of the Fair Labor Standards Act, Congress provided that courts should decide claims involving the maximum hours and minimum wage provisions of the Act. Under Section 16(b), employees are entitled to recover wages unlawfully withheld and, in addition, an equal amount as liquidated damages,

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[8] The petition for a writ of certiorari presents no question regarding the correctness of the Iowa Supreme Court's ruling on the merits.

[9] Petitioner has not contested the Iowa Supreme Court's decision on the merits.

unless the employer satisfies the court that his violation was in good faith. Employees are also entitled to an attorney's fee if they prevail. Actions under Section 16(b) may be commenced within two (or in certain cases three) years after the cause of action accrued, 29 U.S.C. 255.

If employees may not bring actions in court unless they have first exhausted contract grievance procedures, Congress' intent to protect employees through Section 16(b) and related provisions would be frustrated. For example, an arbitrator, who is confined to interpreting the bargaining agreement, may not be authorized to award liquidated damages and, in any event, Congress entrusted courts with the responsibility for deciding whether liquidated damages should be granted. Moreover, liquidated damages under Section 16(b) cannot be bargained away and therefore are not a proper subject for the grievance process.

Also, under the Act employees have at least two years within which to bring their suit, whereas grievances may have to be brought within a substantially shorter period of time, depending on the terms of the contract. Yet Congress provided the two-year period in order to achieve uniformity throughout the nation and to protect employees who may not know their rights under the law. Both of these policies would be frustrated by barring employees from court if they have not first processed their F.L.S.A. claims by filing grievances.

Moreover, Congress specifically determined that employees, not their representative, should prosecute

their claims under the Act. In 1947, Congress repealed the provision of the Act allowing suits to be brought on behalf of individual employees by their representative. However, if an employee's F.L.S.A. claims must be prosecuted through grievance procedures, the employee's representative—the union—will control the claim.

In addition, the grievance process, which is concerned with individual disputes, cannot implement fully the public policy of the Act and is not conducive to the uniformity necessary in order to avoid giving certain employers an unfair advantage over their competitors. These goals can be fulfilled only if employees have direct access to the courts. That Congress intended the courts to decide F.L.S.A. claims is further indicated by the fact that the Secretary of Labor may sue to recover wages withheld in violation of the Act even when the employee himself is unable or unwilling to bring the action on his own behalf.

B

This Court's decision in *Republic Steel Corp.* v. *Maddox,* 379 U.S. 650, cannot be relied upon to show that national labor policy requires employees to invoke grievance procedures before raising statutory claims in court. The doctrine of *Republic Steel* is based on the desirability of utilizing grievance procedures in disputes involving interpretation of the collective bargaining agreement.

In the present case, however, the employees' claims are derived solely from the Act; interpretation of the

collective bargaining agreement is not in issue. In similar contexts this Court has held that employees are entitled to direct access to the courts in order to enforce their statutory rights. *McKinney* v. *Missouri-K.-T. R. Co.*, 357 U.S. 265, 268; *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351. Indeed, there are even stronger reasons for allowing direct access to the courts for F.L.S.A. claims than were present in *McKinney* and *Bulk Carriers*. Unlike those cases, where determination of the statutory rights depended in part on interpretation of the collective bargaining agreement, the employees' rights under the Act in this case are in no way dependent upon or derived from the contract. Furthermore, Congress' intent to afford direct access to the courts is even more apparent from the provisions and policy of the present Act than it was in *Bulk Carriers* or *McKinney*.

In view of Congress' clear intention to afford employees an unqualified right to sue in court, and in view of the fact national labor policy would in no way be served by requiring employees to pursue their statutory claims through grievance procedures, the employees in this case were not barred from recovering in court wages found by the court below to have been withheld in violation of the maximum hours provision of the Act.

ARGUMENT

It is important to identify the precise nature of the employees' claim for unpaid wages in this case. They are not asserting "substantive rights * * * derived solely" from the collective bargaining agreement, as

petitioner contends (Pet. Br., pp. 6–8, 10-11, 15–17, 19). Nor are they seeking a "work-free * * * lunch period," as petitioner also asserts (Pet. Br., pp. 8, 10). Instead, their complaint (A. 2–4) is based solely on the provisions of the Fair Labor Standards Act requiring that a covered employee be paid at "a rate not less than one and one-half times the regular rate at which he is employed" for all hours worked in excess of 40 hours per workweek (29 U.S.C. 207(a)(1)). Specifically, they alleged that in addition to working 40 hours per week, they were on-call for 30 minutes per day during their lunch period, that under the Act this constituted working time compensable at one and one-half times their regular rate of pay, and that their employer refused to compensate them for this (A. 2-4).

It is apparent that these complaints are neither based on the contract nor in any way dependent upon it; the contract is not even mentioned in the complaints. Indeed, the claims and the legal and factual issues raised by these employees would be precisely the same regardless of whether a contract existed or not.

The issue here is thus whether employees seeking to assert statutory rights in court pursuant to the Fair Labor Standards Act are barred from doing so because they did not first invoke the grievance and arbitration procedure in the collective bargaining agreement.[10] Resolution of this issue depends upon

[10] Petitioner does not argue that it should prevail on the merits.

whether Congress intended to afford employees direct access to the courts to enforce their claims under the Act. In light of the wording, purposes, and legislative history of the Fair Labor Standards Act, and in view of the role of arbitration in national labor policy, it is our position that these employees were entitled to go directly to court for a decision on the question whether their employer violated the Act and thereby became liable to them.

A. CONGRESS INTENDED TO GRANT EMPLOYEES DIRECT ACCESS TO THE COURTS IN SECTION 16(b) SUITS.

As this Court stated in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203, the "nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action." In Section 16(b) of the Fair Labor Standards Act Congress not only provided that courts should decide claims involving the maximum hours and minimum wage provisions of the Act, but also defined an employee's statutory right of recovery in relation to litigation. With respect to Section 16(b) and other related sections of the Act, the tribunal chosen by Congress is more than simply an "important part of the parcel of rights" conferred by the Act; it is inextricably intertwined with the rights and remedies Congress provided and cannot be altered without changing the very nature of what Congress guaranteed to employees in order to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a).

Thus, Section 16(b) itself speaks in terms of the "right provided by this subsection to bring an action." Employees who have not been paid minimum wages or overtime compensation are entitled "to recover such liability * * * in any court of competent jurisdiction." 29 U.S.C. 216(b). They are, in addition, entitled to an "equal amount as liquidated damages," unless the employer shows "to the satisfaction of the court" that his violation was in "good faith" and that he had "reasonable grounds" for believing he had not violated the Act, in which case the "court may, in its sound discretion" award a lesser amount of liquidated damages or none at all. 29 U.S.C. 216(b), 260. Moreover, if the employee prevails, the "court in such action shall * * * allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. 216(b). And the employee may commence his action "within two years after the cause of action accrued" or within three years if the employer's violation is willful. 29 U.S.C. 255.

Requiring employees to raise their F.L.S.A. claims through grievance procedures would substantially alter the rights granted by the Act, and alter them in a way Congress could not have intended. Indeed, when the proposed Act was under consideration, a management spokesman advocated revision to provide for enforcement through grievance procedures, *Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong., 1st Sess. 694–695 (1937), but Congress never adopted such a change, either explicitly or implicitly, as examination of the Act's provisions makes clear.

1. *Liquidated damages.* "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement" and "his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597.[11] In addition to the point that F.L.S.A. claims do not generally depend on interpretation of the contract, of which more hereafter, it is at best doubtful that an arbitrator could award liquidated damages, as Section 16(b) provides. An arbitrator would appear to be confined to awarding only unpaid wages since he is limited to interpreting and applying the contract. Moreover, in 29 U.S.C. 260 Congress designated courts, not arbitrators: *judicial* discretion is to be exercised in deciding whether less than the liquidated damages in Section 16(b) should be granted. The employer's "good faith" and "reasonable grounds for believing" that he had not violated the Act, which are to guide the court's discretion under 29 U.S.C. 260, are matters traditionally determined in judicial proceedings.

Furthermore, grievance proceedings are a part of the ongoing process of collective bargaining between the union and the employer. See *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580–581. But liquidated damages under Section 16(b) are both compensatory and an aid to enforcement and are not subject to negotiation. For this reason the Court held in *Schulte Co.* v. *Gangi*, 328 U.S. 108, 114, that

[11] This quotation accurately describes the arbitrator's authority under the contract in the present case (A. 30).

"the remedy of liquidated damages [in Section 16(b)] cannot be bargained away by bona fide settlements of disputes over coverage"—and this necessarily includes settlement of such disputes through the grievance process.[12]

2. *Limitations on actions.* The Act now provides that employees may bring F.L.S.A. suits within two years after their cause of action accrued (or three years if the employer's violation is willful). 29 U.S.C. 255. Congress added this provision in 1947, 61 Stat. 87. Prior to that time state law controlled limitations on actions and Congress found this to have created undesirable "confusion and a lack of uniformity throughout the Nation." H.R. Rep. No. 71, 80th Cong., 1st Sess., at p. 7; H. Conf. Rep. 326, 80th Cong., 1st Sess., p. 13.

Requiring employees to pursue contract grievance procedures in F.L.S.A. cases would bring about the same confusion and lack of uniformity that Congress legislated against, since each collective bargaining agreement has its own time limit for the filing of grievances. In this case, for example, an employee must file his written grievance "within Ten (10) days

[12] In *Schulte* the Court distinguished settlements through stipulated judgments by pointing out the importance of judicial proceedings:

> Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny may differentiate stipulated judgments from compromises by the parties * * * [328 U.S. at 114, n. 8.]

of the knowledge of the incident" (A. 29); the contract also states that "the time allowed to process grievances is adequate" (A. 31). But Congress did not deem 10 days an adequate amount of time for an employee to raise a claim under the Act; it found instead that two years was necessary. And it set this federal standard not only because of the desire for uniformity mentioned above, but also because employees need this amount of time since they may be "afraid to sue or file a complaint, or they simply do not know what their rights are under the law." 93 Cong. Rec. 2258 (1947) (remarks of Senator McGrath). Thus, to require employees to process their F.L.S.A. claims in accordance with contract grievance procedures would be to contravene this explicit congressional policy and thereby diminish the protections Congress granted.

3. *Claims by employee representatives.* Congress has determined that individual employees, rather than their representatives, should prosecute and control their claims under the Act. In 1947, Congress deleted the portion of Section 16(b) which had provided that "employees may designate an agent or representative to maintain" an action in their behalf. See 52 Stat. 1069; S. Rep. No. 48, 80th Cong., 1st Sess., p. 49.

By contrast, the union, as representative of the employees, is responsible for controlling the processing of grievances. See *Vaca* v. *Sipes*, 386 U.S. 171. The contract in this case, for instance, provides that beyond Step I, where the employee files a written grievance, the union grievance committee or an officer of the union will control prosecution of the grievance and

may submit the matter finally to arbitration if it has not been satisfactorily adjusted (A. 29–30). While union control and responsibility have been deemed desirable for grievances arising out of contract disputes because "[s]uch activity complements the union's status as exclusive bargaining representative" and "enhance[s] the union's prestige with employees," *Republic Steel Corp* v. *Maddox,* 379 U.S. 650, 653, this has little relevance when the dispute involves rights under the Act, rights that cannot be diminished by collective bargaining. See *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 704, 710; see p. 25 *infra.*[13] More important, Congress has determined that F.L.S.A. claims are to be prosecuted by the employees themselves, not by their representatives.

4. *Public policy of the Act and the need for uniformity.* Unlike a collective bargaining contract, the Fair Labor Standards Act is concerned with more than simply adjustment of the working relationship of particular employees and their employer. It has a

[13] There is somewhat of an exception to this in Section 3(o) of the Act, 29 U.S.C. 203(o), which defines "hours worked" to exclude "any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from measured working time during the week involved by the express terms of or by custom or practice under a bona fide collective-bargaining agreement."

Also, in certain situations, a collective bargaining contract can make activity, otherwise not considered to be work under the Act, compensable at the statutory rate. See Section 4 of the Portal-to-Portal Act of 1947, 29 U.S.C. 254, under which travel time to and from the place of performance of principal activities, and activities that are preliminary or postliminary to the principal activity are not working time within 29 U.S.C. 207 unless the contract so provides.

public purpose. In enacting Section 7, the maximum hours provision, Congress sought "to spread employment by placing financial pressure on the employer through the overtime pay requirement." *Walling* v. *Helmerich & Payne*, 323 U.S. 37, 40; see also *Overnight Motor Co.* v. *Missel*, 316 U.S. 572, 576–578; *Roland Co.* v. *Walling*, 326 U.S. 657, 669–670. The standards in the minimum wage and maximum hours provisions, 29 U.S.C. 206, 207, are to be applied in light of the Act's public purposes and to be applied uniformly so that no employer gains an unfair advantage over his competitor. See *Brooklyn Bank* v. *O'Neil, supra*, 324 U.S. at 710."

However, if these claims must be processed through grievance procedures and then submitted to arbitration, the public policy of the Act will be overshadowed, perhaps lost entirely. Uniformity will not

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" Congress rejected an early House bill that would have prohibited the establishment of minimum wage and maximum hours for employees in occupations or industries where a "substantial portion of the employees" were covered by "collective bargaining agreements" and the "facilities for collective bargaining" were adequate to accomplish the purposes of the Act (H.R. Rep. No. 1452, 75th Cong., 1st Sess., p. 15). As explained in H.R. Rep. 2182, 75th Cong., 3d Sess., pp. 6–7 (1938):

> There are to be no differentials either between sections of the United States, between industries, or between employers. No employer in any part of the United States in any industry affecting interstate commerce need fear that he will be required by law to observe wage and hour standards higher than those applicable to his competitors. No employee in any part of the United States in any industry affecting interstate commerce need fear that the fair labor standards maintained by his employer will be jeopardized by oppressive labor standards maintained by those with whom his employer competes. * * *

be possible. Even if the matter reaches arbitration, arbitrators are concerned only with adjustment of contractual disputes between the particular parties to the contract. They do not necessarily follow *stare decisis*.[15] "Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial." *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203; see also *Wilko* v. *Swan*, 346 U.S. 427.

5. *Enforcement by the Secretary of Labor.* The fact that the Secretary of Labor may sue, upon the employee's request, to recover wages withheld in violation of the Act, 29 U.S.C. 216 (c),[16] further indicates that Congress could not have intended to require employees to raise such claims by grievances before they are entitled to seek redress through the courts. That Congress empowered the Secretary to bring such actions reflects the public character of the Act, and plainly shows that Congress intended violations of the Act to be redressed in court even where the employee is unable or unwilling to bring the action himself. A system in which an employee must first pursue grievance procedures to vindicate his statutory rights,

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[15] See Cox & Bok, *Labor Law* 519-520 (1965 ed.); Warren & Bernstein, *A Profile of Labor Arbitration*, 16 Lab. Arb. 970 (1951).

[16] In 1961, Congress also restored to the federal courts jurisdiction to order restitution of unpaid wages in injunction actions brought by the Secretary on his own initiative. 29 U.S.C. 217. Compare *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288.

even though the Secretary may sue in court upon his own initiative, 29 U.S.C. 217, or upon the employee's request, 29 U.S.C. 216(c), is far-removed from the enforcement mechanism Congress found necessary in order to realize the goals stated in Section 2 of the Act, 29 U.S.C. 202.

B. THE DECISIONS OF THIS COURT IMPLEMENTING NATIONAL LABOR POLICY CONFIRM CONGRESS' INTENT IN THE FAIR LABOR STANDARDS ACT TO ALLOW SUITS FOR VIOLATION OF THE ACT TO BE BROUGHT DIRECTLY IN COURT

Petitioner relies on this Court's decisions in *Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, and *Republic Steel* v. *Maddox,* 379 U.S. 650, in arguing that the employees in this case could not raise their claims in court because they have not invoked contract grievance procedures. In our view, however, consideration of these cases and this Court's decisions in *McKinney* v. *Missouri–K.–T.R. Co.,* 357 U.S. 265, and *U.S. Bulk Carriers* v. *Arguelles,* 400 U.S. 351, confirm that employees have, as Congress intended, direct access to courts in order to vindicate their rights under the Act.

In *Textile Workers Union* v. *Lincoln Mills, supra,* this Court held that Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, which conferred jurisdiction on federal courts over "[s]uits for violation of contracts between an employer and a labor organization," also empowered courts in Section 301 suits to apply federal substantive law "which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456. In the *Steelwork-*

ers Trilogy,[17] where a union brought Section 301 suits to compel arbitration, this Court upheld the union's claims on the basis of the national labor policy expressed in Section 203(d) of the L.M.R.A., 29 U.S.C. 173(d): "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." And in *Republic Steel Corp.* v. *Maddox, supra,* this Court, again relying upon Section 203(d), held that before an individual employee can sue in court for violation of the collective bargaining contract he must first attempt to invoke the contract grievance procedures.

In the present case, where the claims arise under a federal statute and do not involve interpretation of a collective bargaining agreement, see pp. 12–13 *supra*, *Republic Steel* does not require that the employees pursue grievance procedures. The national labor policy expressed in Section 203(d) of the Labor Management Relations Act and implemented in *Republic Steel* and other decisions is a policy in favor of arbitration as the means of settling collective bargaining disputes. But neither Congress nor this Court has ever suggested that grievance procedures in a labor con-

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[17] *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U.S. 564; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593.

tract are the preferred method of vindicating an employee's federal statutory rights, particularly when those rights are independent of the contract.

To the contrary, as Mr. Justice Harlan, concurring, explained in *U.S. Bulk Carriers* v. *Arguelles*, 400 U.S. 351, 361, remitting an individual employee to the arbitral forum is favored only when the employee's "substantive rights derive solely from the contract" that the union has negotiated. However, when, as in this case, the employee asserts rights derived from a federal statute "the presumption of comprehensiveness of the arbitral remedy is * * * rebutted." 400 U.S. at 362. Thus, in *McKinney* v. *Missouri-K.-T. R. Co.*, 357 U.S. 265, 268, this Court held, unanimously,[18] that a returning serviceman "was not obliged * * * to pursue remedies possibly available under the grievance procedure set forth in the collective bargaining agreement" before bringing an action in court under Section 9(d) of the Universal Military Training and Service Act to require his former employer to comply with the Act's provisions regarding reemployment and seniority rights.[19] The Court so held despite the fact that determination of the statutory rights asserted by the serviceman "may necessarily involve interpre-

[18] Mr. Justice Black and Mr. Justice Douglas dissented on the merits. 357 U.S. at 274.

[19] This Court has also held that the remedies prescribed by statute remain available for vindication of the statutory right even though the parties proceed first in some alternative forum. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357; *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 270–271.

tation of a collective bargaining agreement." 357 U.S. at 268.[20]

With respect to rights claimed under the Fair Labor Standards Act, the reason for the rule in *McKinney* and in *Bulk Carriers,* see pp. 27–29 *infra,* is plain. Grievance proceedings are a part of the collective bargaining process between the union and the employer. But the minimum guarantees in Sections 6 and 7 of the Act cannot be diminished by bargaining, see, *e.g., Martino* v. *Michigan Window Cleaning Co.,* 327 U.S. 173, 177–178; *Walling* v. *Hardwood Co.,* 325 U.S. 419; *Coleman* v. *Jiffy June Farms, Inc.,* No. 71–1412, C.A. 5, decided November 29, 1971; 29 C.F.R. 778.316–.317, and a union should not be permitted to drop an employee's F.L.S.A. claim as the *quid pro quo* for a concession by the employer on some other matter.

Even if such a grievance reaches arbitration, the usual policies in favor of having an arbitrator determine the dispute are not present. Arbitrators may be versed in the common law of the shop and they may have expertise in applying and interpreting collective bargaining agreements. But F.L.S.A. claims, such as those of the employees here, require statutory interpretation (in the context of detailed legislative history), consideration of the judicial decisions, including those of this Court, that have dealt with F.L.S.A. claims involving similar or analogous circumstances, and attention to administrative determinations.

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[20] *McKinney* is not cited in any of the opinions in *Bulk Carriers, supra.*

These are matters peculiarly within judicial competence, as Congress and this Court have recognized. And in the three decades that have passed since enactment of the Fair Labor Standards Act, a considerable body of law has developed through court decisions interpeting the Act. With respect to the employees' claim for overtime compensation in this case, for example, there is a long line of court decisions relevant to the issue whether "on call" time constitutes working time under the Act.

Thus, this Court has held that compensable working time under the Act is not limited to periods of active work, but includes as well idle time when this is required by the employer's schedule. See *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133; *Skidmore* v. *Swift & Co.*, 323 U.S. 134. And there are numerous lower court decisions dealing with the question whether an employee who is "on call" during mealtime is engaging in compensable work under the Act. See, *e.g.*, *F. W. Stock & Sons* v. *Thompson*, 194 F. 2d 493, 496 (C.A. 6); *Biggs* v. *Joshua Hendy Corp.*, 183 F. 2d 515, 520 (C.A. 9); *Glenn L. Martin Nebraska Co.* v. *Culkin*, 197 F. 2d 981, 984–985 (C.A. 8), certiorari denied, 344 U.S. 866; *Douglass* v. *Hurwitz Co.*, 145 F. Supp. 29, 34, n. 16 (E.D. Pa.); *Schultz* v. *A–1 Ambulance Service, Inc.* 63 CCH Lab. Cas. ¶ 32,393 (E.D. Ark., decided September 22, 1970).[21] See also 29 C.F.R. 785.17–.19.

[21] These cases all rule in favor of the employee. Contrast *American Enka Corp. & United Textile Workers of America Local 815*, 65–2 CCH Arb. ¶ 8691 (Morristown, Tennessee, September 3, 1965), where the arbitrator denied the employees any compensation for interrupted lunch periods on the ground that under the contract, provisions for lunch periods could be changed only by mutual agreement.

While the doctrine of *Republic Steel, supra,* is thus inapposite,[22] the Court's decisions in *McKinney* v. *Missouri-K.-T.R. Co., supra,* which we have already discussed, see pp. 24–25 *supra,* and *U.S. Bulk Carriers, Inc.* v. *Arguelles,* 400 U.S. 351, are particularly relevant. In *Bulk Carriers* the Court held that seamen were entitled to sue in federal court for unpaid wages and the statutory penalty without having to exhaust grievance procedures. These decisions apply *a fortiori* to the present case, where the employees' statutory rights

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[22] Petitioner has cited four decisions to support its position: *Donahue* v. *Susquehanna Collieries Co.*, 138 F. 2d 3 (C.A. 3); *Watkins* v. *Hudson Coal Co.*, 151 F. 2d 311 (C.A. 3), certiorari denied, 327 U.S. 777; *Evans* v. *Hudson Coal Co.*, 165 F. 2d 270 (C.A. 3); and *Beckley* v. *Teyssier*, 332 F. 495 (C.A. 9). To the extent that these cases stand for the proposition that employees seeking to assert F.L.S.A. claims in court must first pursue contract grievance procedures, they are inconsistent with this Court's decisions in *McKinney, supra,* and *Bulk Carriers, supra,* and, in our view, are in error. Other courts that have considered the matter have not followed the cases petitioner cites but have held instead that employees have direct access to courts in F.L.S.A. cases. See, *e.g.*, *Lexington Federation of Telephone Workers* v. *Kentucky Telephone Corp.*, 94 F. Supp. 894 (E.D. Ky.), affirmed, 202 F. 2d 153 (C.A. 6); *Ballard* v. *Consolidated Steel Corp. Ltd.*, 61 F. Supp. 996 (S.D. Calif.); *Bailey* v. *Karolyna Co.*, 50 F. Supp. 142, 143–144 (S.D. N.Y.); *Adams* v. *Union Dime Savings Bank*, 48 F. Supp. 1022 (S.D. N.Y.); *Mackin* v. *Bagold Corp.*, 8 CCH Lab Cas. ¶ 62,183 (S.D. N.Y.); *Stone* v. *William Andacht, Inc.*, 21 Misc. 2d 214, 191 N.Y.S. 2d 116 (N.Y. City Ct.); *Andacht* v. *William Andacht, Inc.*, 183 N.Y.S. 2d 62 (N.Y. City Ct.); *Berman* v. *N. Seidman & Son*, 22 CCH Lab. Cas. ¶ 67,362 (N.Y. Sup. Ct.); *Garrity* v. *Bagold Corp.*, 42 N.Y.S. 2d 257 (N.Y. Sup. Ct.), modified and affirmed, 267 App. Div. 353, 46 N.Y.S. 2d 637; *Matter of City Bank Farmers Trust Co.*, 179 Misc. 770, 39 N.Y.S. 2d 842 (N.Y. Sup. Ct.); *E. & A. Building Corp.* v. *Gunderson*, 6 CCH Lab. Cas. ¶ 61, 556 (N.Y. Sup. Ct.).

are derived entirely from the statute itself and raise no issues of contract interpretation—a fact that avoids the difficulty that divided the Court in *Bulk Carriers*.

In *Bulk Carriers*, the claimant's statutory and contract rights were interdependent [33]—that is, the statute created no substantive rights but simply provided a penalty for the late payment of wages. The question whether the claimant was entitled to the statutory penalty depended on whether any wages were due, and this in turn depended "entirely on interpretation and application of the bargaining agreement" (Mr. Justice White, dissenting, 400 U.S. at 371).[34] In the present case, however, the terms of the contract are irrelevant to the employees' claims. Whether on-call time is com-

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[33] This was true also in *McKinney*, *supra*, 357 U.S. at 268.

[34] Compare *Collyer Insulated Wire*, 77 LRRM 1931, 192 NLRB No. 150 (August 20, 1971), where the Board, over the union's objection, deferred to arbitration the question whether the company's changes in wages and working conditions violated the collective bargaining agreement, in which event such changes would also constitute an unfair labor practice. In deferring to arbitration, the Board majority emphasized that the "contract and its meaning * * * lie at the center of this dispute," whereas "the Act and its policies become involved only if it is determined that the agreement between the parties, examined in the light of its negotiating history and the practices of the parties thereunder, did not sanction [the company's] right to make the disputed changes" (77 LRRM 1936).

The Board also reserved jurisdiction in order to "guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law" (77 LRRM 1937). In this connection, the Board, in order "to effectuate the policies of the Act," may review *de novo* the factual and legal determinations underlying arbitral awards. See, *e.g.*, *National Labor Relations Board* v. *Acme Industrial Co.*, 385 U.S. 432, 436–438; *Carey* v. *Westinghouse Corp.*, *supra*, 375 U.S. 261, 271–272.

pensable depends not on the terms of the contract, but on the provisions of the Fair Labor Standards Act, see p. 13 *supra*, and on whether these employees were already working 40 or more hours a week, which would entitle them to receive the premium overtime rate required by the Act for additional work time.

Thus, unlike the Seaman's Act involved in *Bulk Carriers*, the Fair Labor Standards Act not only provides the remedy (recovery of unpaid overtime compensation, together with liquidated damages and attorney's fees) but also creates the substantive right (compensation for overtime work at one and one-half times the employee's regular rate). That an arbitrator might interpret the collective bargaining agreement as also requiring petitioner to compensate these employees for on-call time does not alter the statutory nature of respondents' claim, nor, we submit, compel them to exhaust their contract grievance procedures before filing suit under Section 16(b) of the Fair Labor Standards Act.

Moreover, unlike *Bulk Carriers* where Congress merely provided a forum for recovery of the statutory penalty, Congress defined the rights granted by the Fair Labor Standards Act by intertwining the standards set by the Act with the manner in which they are to be enforced—by litigation in a court of law. And as we have discussed in detail, pp. 14 to 22 *supra*, Congress' intent to afford direct access to the courts is even more apparent from the provisions and policies of the present Act than it was in *Bulk Carriers*, or in *McKinney*.

CONCLUSION

The judgment of the Supreme Court of Iowa should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

A. RAYMOND RANDOLPH, JR.,
Assistant to the Solicitor General.

RICHARD F. SCHUBERT,
Solicitor,
CARIN ANN CLAUSS,
MICHAEL H. LEVIN,
HELEN W. JUDD,
Attorneys,
Department of Labor.

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IOWA BEEF PACKERS, INC. *v.* THOMPSON ET AL.

CERTIORARI TO THE SUPREME COURT OF IOWA

No. 70-288. Argued January 12, 1972—Decided February 29, 1972

Court's grant of certiorari to decide whether employees may sue for overtime allegedly withheld in violation of the Fair Labor Standards Act if the complaint of that violation was also subject to grievance and arbitration provisions of a collective-bargaining agreement *held* improvidently granted in view of subsequent disclosure that those provisions did not apply to all disputes, but merely those based on violations of the agreement.

185 N. W. 2d 738, certiorari dismissed as improvidently granted.

Louis S. Goldberg argued the cause for petitioner. With him on the brief was *P. L. Nymann.*

Raymond Edward Franck argued the cause and filed a brief for respondents.

A. Raymond Randolph, Jr., argued the cause *pro hac vice* for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Griswold* and *Richard F. Schubert.*

PER CURIAM.

Respondents brought this suit in an Iowa District Court under § 16 (b) of the Fair Labor Standards Act, 52 Stat. 1069, as amended, 29 U. S. C. § 216 (b), to recover overtime compensation allegedly not paid by their petitioner employer in violation of the overtime provisions of the Act, 29 U. S. C. § 207 (a)(1). The District Court denied petitioner's motion to dismiss the action for failure of respondents to exhaust the grievance arbitration procedures provided in a collective-bargaining agreement between petitioner and respondents' union and awarded respondents the overtime claimed plus costs and attorneys' fees. The Supreme Court of Iowa affirmed, 185

N. W. 2d 738 (1971). We granted certiorari, 404 U. S. 20 (1971).

The collective-bargaining agreement required petitioner o provide a lunch period for each employee no later han five hours from the start of an employee's shift. 'etitioner provided the lunch period but required the em- loyees to remain on call during the period. Respondents id not choose, as perhaps under the contract was open o them, to make the requirement the basis of a grievance or alleged violation either of the lunch-period provision r of the hours-of-work provision, Art. VII, requiring ime and one-half for hours worked over eight in any day r 40 in any week. They claimed instead that, because f the requirement, the Fair Labor Standards Act, as a natter of law, rendered the lunch period "work" time, whether or not actually worked, for the purpose of de- ermining whether petitioner violated his statutory obli- ation to pay overtime rates for work hours over 40 in any work week. See *Armour & Co.* v. *Wantock*, 323 U. S. 126 1944). The grievance thus pertained not to an alleged iolation of the agreement but to an alleged violation f the Fair Labor Standards Act.

In *U. S. Bulk Carriers* v. *Arguelles*, 400 U. S. 351 1971), the Court held that a seaman could sue in federal ourt for wages under 46 U. S. C. § 596 without invoking rievance and arbitration procedures under a collective- argaining agreement that provided for resolution of all isputes and grievances, not merely those based on al- eged violations of the contract. We granted certiorari n this case to decide whether, similarly, employees may ue in court to recover overtime allegedly withheld in iolation of the Fair Labor Standards Act, if their com- laint of alleged statutory violation is also subject to reso- ution under grievance and arbitration provisions of a ollective-bargaining agreement. It developed at oral rgument, however, that the grievance and arbitration

provisions, Art. XX, of the collective-bargaining agreement involved in this case do not have the broad scope of the procedures in *Arguelles*, but apply only to grievances "pertaining to a violation of the Agreement." Moreover, the issues as presented by petitioner provide no occasion to address, and we intimate no view upon, the question whether, although the statutory claim is not subject to contract arbitration, pursuit of the statutory remedy is nevertheless barred because respondents might have made the requirement to be on call the basis of a grievance for alleged violation of the lunch period or overtime provision of the collective-bargaining agreement. In these circumstances, which were not fully apprehended at the time certiorari was granted, the writ of certiorari will be dismissed as improvidently granted. *The Monrosa* v. *Carbon Black, Inc.*, 359 U. S. 180, 183 (1959).

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting.

The arbitration clause in this collective agreement reaches "a grievance pertaining to a violation of the Agreement." The agreement covered both the lunch period [1] and overtime.[2]

The Iowa Supreme Court held that "[t]he present controversy is undoubtedly arbitrable" under the collective agreement. Given the presumption favoring liberal constructions of arbitration clauses, *Steelworkers* v. *Warrior & Gulf Co.*, 363 U. S. 574, 582–583, we should defer to

[1] Art. XIV, § 1, states:

"A lunch period shall be provided no later than five (5) hours from the start of an employee's shift, except when the shift does not exceed five and one-half (5½) hours."

[2] Art. VII, § 3, states:

"Time and one-half (1½) will be paid for hours worked in excess of eight (8) in any day. Time and one-half (1½) will be paid for all hours worked in excess of forty (40) in any one week."

that ruling. Even under that construction it seems that a suit for overtime allegedly withheld in violation of the Fair Labor Standards Act, 29 U. S. C. § 207 (a)(1) is maintainable. That would mean affirming the Iowa Supreme Court. *U. S. Bulk Carriers* v. *Arguelles*, 400 U. S. 351, which kept the courthouse door open, would seem to control this case.[1]

An affirmance would follow *a fortiori*, if this collective agreement be construed as not requiring arbitration of this FLSA claim. For then it would seem that the worker would have a choice to sue under the statute or to proceed to arbitration on his contractual claim arising out of the same dispute.

The petition, however, is not dismissed for those reasons but for a wholly different one. It is said that there was a requirement to be "on call" and that that duty conflicted with the lunch or overtime provisions of the agreement. The difficulty is twofold: there was no "on call" grievance ever tendered so far as the record

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[1] The Iowa Supreme Court properly stated:

"We doubt that the general Congressional intent favoring arbitration can stand against the specific Congressional intent which is manifest in the Fair Labor Standards Act provisions giving employees strong and detailed rights in court. We think Congress intended that workmen should have free access to the courts in FLSA cases. We are the more persuaded of that view by the broad Congressional policy expressed in § 2 of FLSA, 29 U. S. C. A. § 202. There the objectives of the act are set forth, and those objectives encompass more than simply wage relief for employees; they include broad economic considerations—improvement in commerce among the states. The remedies provided by the act are part of the Congressional scheme to obtain employer compliance with the act and hence achievement of those broader objectives. We believe that if Congressional intent to allow a seaman to arbitrate or sue at his option is manifest in the seaman's act involved in Arguelles, as the Court held there, then an intent to give workmen such an option is also manifest in the Fair Labor Standards Act." 185 N. W. 2d 738, 742.

shows; moreover, the agreement concededly does not cover any "on call" requirement or duty. So there is no conflict between statutory remedy and remedy by arbitration and the difficulty posed is imaginary.

We should "dismiss as improvidently granted" only in exceptional situations and where all nine members of the Court agree. In all other cases the merits of the controversy should be decided. The present case on its facts is simple and uncomplicated; and a decision on the merits is apparently important to unions and employer alike.